Office Supreme Court,
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In the

Supreme Court of the United States.

October Term, 1909.

No. 194.

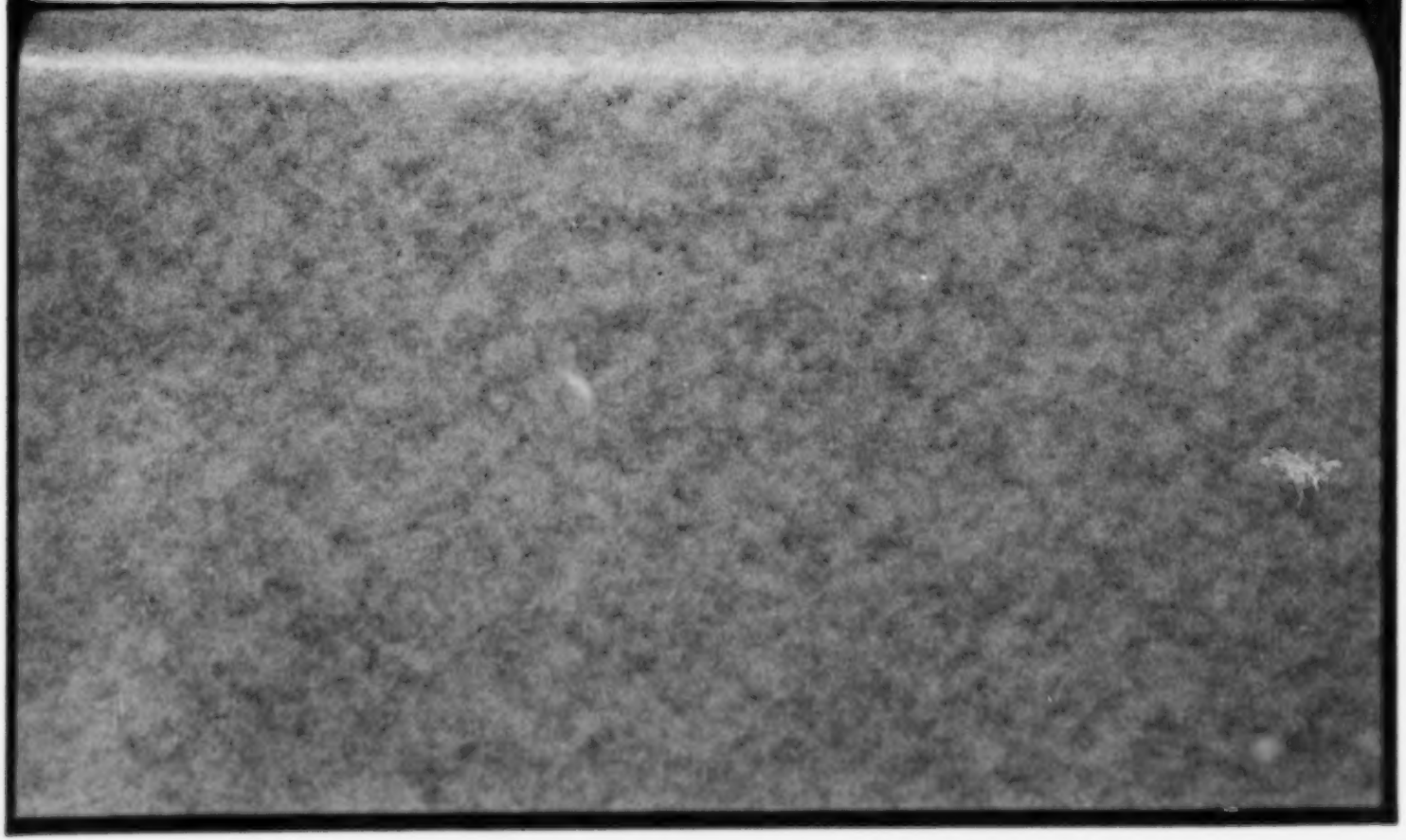
BARBER ASPHALT PAVING COMPANY,
Petitioner,

against

STANDARD ASPHALT & RUBBER COMPANY,
Respondent.

BRIEF FOR RESPONDENT.

Charles Evans Hughes,
Alexander P. Brownell,
Thomas G. Haskell,
Frank L. Dewey,
William F. Hall,
Counsel for Respondent.



SUBJECT INDEX.

PAGE

I. Supplemental statement of the case..... 1

II. Reply to points urged by petitioner..... 17

1. Petitioner's Point I 17

(a) Petitioner's contention as to the validity of Equity Rule 75 is wholly unsound and due to a misconception of the proper functions of a court of equity and the scope of its inherent power with respect to its control over its records and its decrees and a misunderstanding of the rules of the Circuit Court of Appeals of the Seventh Circuit, since the quotation in the brief of petitioner about certificates of evidence was not in the rules when this appeal was perfected. The rule then in force related only to writs of error, and by its Rule 8 the Circuit Court of Appeals adopted the practice of the Supreme Court..... 17

(b) Petitioner's contention that it complied with all the rules of the Circuit Court of Appeals in this case is incorrect and the rule quoted by petitioner was not in effect when this appeal was perfected.. 27

(c) Petitioner's contention that Section 865 of Title 28 of the United States Code (Act of February 13, 1911; 36 Stat. 901) limits the power of this court to prescribe only the physical form of the printed transcript of record of the lower court and that Congress by that act delegated the power of condensation of the record to the Circuit Court of Appeals is a narrow and unjustifiable construction of the Act..... 29

2. Petitioner's Point II 31

The Circuit Court of Appeals could not properly have held that there was any evidence properly before it because petitioner failed to have the evidence properly certified to by the judge of the District Court and because the record in this case was not "true, complete and properly prepared" in any sense of the words 31

3. Petitioner's Point III 40

The failure of the petitioner to comply with Equity Rule 75 was not a mere technical defect and it materially affected "the substantial rights" of respondent 40

4. Petitioner's Point IV 42

The District Court lacked power to enter its belated order directing all the testimony to be reproduced in the exact words of the witnesses 42

The flagrant violation of Equity Rule 75 by petitioner is not a mere question of error or mistake, but a deliberate flaunting of the rule. The Circuit Court of Appeals' affirmance of the judgment of the lower court is quite in line with the general practice and is not contrary to Equity Rule 76 42

5. Petitioner's Point V 48

The Circuit Court of Appeals should not have passed upon the issue of plaintiff's title because there was no way for it to know, from the evidence properly before it, whether "all the evidence upon this issue was in the record and entirely in documentary form" 48

Moreover, there was oral evidence introduced which bore materially upon the question of the title and right of respondent to maintain this suit 48

6. Petitioner's Point VI..... 50

In view of petitioner's defiance of the plain language of Equity Rule 75 for over a year after full notice of its violation, the Court of Appeals not only did not abuse its discretion, but could not, under the circumstances, have done otherwise than affirm the judgment of the lower court without doing grave injustice and injury to respondent 50

III. Points presented and urged by respondent.... 73

Point I 73

The Circuit Court of Appeals properly refused to consider the purported evidence because it had not been condensed and put in narrative form, in violation of Equity Rule 75 73

Point II 74

The purported evidence in the transcript of the record was never, prior to the filing of the transcript in the Court of Appeals on July 3, 1925, presented to or approved by the District Court or judge, nor was the same filed, upon and after such approval, in the office of the clerk of the District Court, and thereby made a part of the record of the District Court, as specifically required by Equity Rule 75.... 74

In consequence, the clerk of the District Court had no right or authority to include this purported evidence whether in uncondensed or narrative form in the transcript of the record filed in the Circuit Court of Appeals, and the Court of Appeals would have had no right to consider the same 74

Point III 75

The order of March 30, 1926, entered by the District Court at the request of appellant (petitioner here), approving the purported evidence in the transcript of the record, was ineffective because, as a

matter of law, such approval could not be evidenced by an independent order such as that of March 30, 1926, but required the certificate and signature of the District Court or judge to be attached or affixed to the purported evidence in the transcript itself for the purposes of proper identification and authentication, which, however, the District Court or judge did not do 75

The approval of a certificate of evidence, endorsed and identified by the certificate and signature of the trial judge attached thereto, is indispensable to its being filed and made a part of the record in the cause, and in the absence of this an alleged certificate of evidence cannot be included in and made a part of the transcript of such record by the clerk of the court and cannot be considered by the Court of Appeals 75

Point IV 78

Entirely aside from the question whether such approval could be properly evidenced by the independent order of March 30, 1926, or required the certificate and signature of the judge to be attached or affixed to such evidence in the transcript, as we contend, the purported evidence in the transcript never was made a part of the record of said District Court by filing the same in the office of the clerk of the District Court after the entry of the order of March 30, 1926, as required by Equity Rule 75, even if the order of March 30, 1926, be treated as an approval, which we contend it cannot, within the meaning of Equity Rule 75 78

Because of the foregoing considerations therefore, the purported evidence never was properly or effectively made a part of the transcript of the record filed in the Circuit Court of Appeals, and hence, was of necessity properly disregarded by that court 78

Point V 80

The Court of Appeals also properly and necessarily refused to consider the evidence because, notwithstanding the recital in the order of March 30, 1926 (Rec., 49) that "Pages 24 to 4872, inclusive, of the transcript of record heretofore certified by the clerk of this court on June 29, 1925, amended and supplemented as herein directed, are hereby approved as a true, complete and properly prepared statement of the evidence (including testimony and exhibits therein referred to and the stipulation of the parties) in the above entitled cause," it affirmatively appears from the record itself that it is not a true nor a complete statement of the evidence, in that it omits 114 exhibits out of a total of 196 exhibits introduced by appellant and appellee and received in evidence on the infringement and on the accounting issue, and is in other respects untrue and incomplete 80

Point VI 82

The Circuit Court of Appeals did not err in refusing to grant petitioner's belated motion for leave to procure from the District Court a record complying with Equity Rule 75, because such an order would have been a nullity, since it would have directed the District Judge to do an act which, as a court or judge, he was powerless to perform 82

(a) A certificate of evidence, the same as a bill of exceptions, must be settled, "approved" and signed and filed within the term or within such extension as the court may grant, and the court has no power or jurisdiction to do so thereafter 83

(b) When an appeal has been fully perfected, nothing remaining to be done to that end, the exclusive jurisdiction of the cause is vested in the Court of Appeals pending the appeal, and the trial court loses all jurisdiction over the cause and its record and the parties, and cannot be reinvested with jurisdiction or authority to add to or take from the record by approving and certifying to a certificate of evidence, any more than a bill of exceptions or otherwise, either on its own motion or by the Court of Appeals.. 87

(c) The settling and signing of a bill of exceptions or a certificate of evidence is not a ministerial, but is on the contrary a judicial act, and cannot be exercised unless the court has jurisdiction of the cause and the parties and control over its record, which was not true in the case at bar, as we have shown 92

(d) Certain cited cases holding that the settling and approval and filing of a certificate or statement of the evidence, under Equity Rule 75, is a ministerial act and may be done after the term and the perfecting of an appeal, we contend, are unsound and should not be followed..... 94

IV. Appendix A .....App. 1

V. Appendix B .....App. 6

Table of Cases.

PAGE

("App." refers to cases in appendices.)

Albers v. Roberts, 150 S. W. (Tex.) 596 ..... App. 1
Albrecht v. Lignoski, 151 S. W. (Tex.) 886; 154 S. W. 354 ..... App. 1
Allen v. LeMoyne, 101 Ill. 655 ..... App. 9

Babcock v. Johnson, 22 Ind. App. 97; 53 N. E. 241. App. 2
Bacon v. Neill, 283 Fed. 717 (C. C. A. 9th Cir.) 26
Barger v. Halford, 10 Mont. 57; 24 Pac. 699 ..... App. 2
Barlass v. Kargus, 111 Wis. 611; 87 N. W. 800 .... App. 6
Baubletts v. Krug Park Amusement Co., 81 S. W. (Mo. App.) 1179 ..... App. 3
Bell v. Bell, 60 Kans. 857; 56 Pac. 471 81
Blair v. Miller, 4 Dall. 21 ..... App. 4
Blease v. Garlington, 92 U. S. 1 12
Blisse v. United States, 263 Fed. 961 (C. C. A. 2nd Cir.) 55, 89
Brietson Mfg. Co. v. Close, 280 Fed. 297 (C. C. A. 8th Cir.) 26
Bronson v. Schulten, 104 U. S. 410 ..... 83, 84, 86, 92, 95
Brown v. Vizcaya, 54 S. W. (Tex.) 636 ..... App. 1
Buckeye Cotton Oil Co. v. Ragland, 11 Fed. (2nd) 231; (C. C. A. 5th Cir.) 25
Buessel v. United States (258 Fed. 811 (C. C. A. 2nd Cir.) 23, 24, 25, 34, 41, 44, 46, 77
Burr v. Henry, 59 Neb. 301; 80 N. W. 900 ..... App. 4

Cameron v. M'Roberts, 3 Wheat 591 85
Carriger v. Kennedy, 134 Ind. 107; 33 N. E. 907 ... App. 3
Carson v. Hurt, 250 Fed. 30 (C. C. A. 5th Cir.) .. 25, 77, 81
Carter County v. Schmalstig, 127 Fed. 126 (C. C. A. 6th Cir.) ..... App. 2
Castro v. United States, 3 Wall. 46 ..... App. 4
Caswell v. Hopson, 43 S. W. 547 (Ct. Civ. App. Tex.) 45
Chadwick v. People, 206 Ill. 122 ..... App. 3
Chinn v. Davis, 18 Mo. App. 539 ..... App. 3
Cincinnati Traction Co. v. Ruthman, 85 Oh. St. 62; 96 N. E. 1019 93
Citizens St. R. Co. v. Heath, 154 Ind. 363; 55 N. E. 744 93

Clark Mfg. Co. v. Tablet & Ticket Co., No. 3740 (C. C. A. 7th Cir.) 41, 47, 59, 60, 71
Clark-Harris Co. v. Douthet, 5 Wash. 96; 31 Pac. 422 56
Cleveland C. C. & St. Louis Ry. Co. v. Snow, 37 Ind. App. 646; 74 N. E. 908 ..... 44, App. 2
Conductors' Benefit Ass'n. v. Leonard, 166 Ill. 154 87
Conn v. Penn, 5 Wheat 424 20
Cookville Coal & Lumber Co. v. Evans, 135 S. W. (Tex.) 750 ..... App. 1
Corinne M. C. & S. Co. v. Johnston, 5 Utah 147; 13 Pac. 17 ..... App. 3
Coxe v. Peck Williamson H. & V. Co., 208 Fed. 409 (C. C. A. 5th Cir.) 25
Cunningham v. School District, 215 S. W. (Mo.) 249 ..... App. 3
Darden v. Williams, 100 Tenn. 414; 45 S. W. 669 .. 93
Davenport v. Ells, 22 Iowa 296 ..... App. 4
Davis v. Wall, 142 N. Car. 450; 55 S. E. 350 ..... App. 2
Ditch v. Sennott, 116 Ill. 288 ..... App. 5
Dixon v. Poe, 158 Ind. 54; 62 N. E. 628 ..... App. 3
Dolson's v. Sheridan Stove Mfg. Co., 178 S. W. (Tex.) 663 ..... App. 1
Drake v. New York Mine, 55 N. Y. Supp. 920 56
Edmonson v. Bloomshire, 7 Wall. 306 ..... App. 4
Re Equity Rule 75, 222 Fed. 884 (C. C. A. 6th Cir. 25, 45, 94, 95, 98
Fairbanks Morse & Co. v. American Valve & Meter Co., 18 Fed. (2nd) 716 (C. C. A. 7th Cir.) .. 1, 35, 63, 65
Firestone Tire & Rubber Co. v. Seberling, 235 Fed. 891 (C. C. A. 6th Cir.) 25
First National Bank v. State National Bank, 131 Fed. 430 (C. C. A. 9th Cir.) 89
Garland v. Quinn, 242 Fed. 267 (C. C. A. 6th Cir.) 25
Goodwin v. United States, 295 Fed. 856 (C. C. A. 6th Cir.) 25, 94, 98
Grant v. Grant, 46 Iowa 478 ..... App. 4
Green v. Elbert, 137 U. S. 615 ..... App. 3
Greenwood v. Randall, 111 U. S. 775 ..... App. 2
Griffin v. Burrus, 292 S. W. (Tex.) 561 ..... App. 1
Grigsby v. Purcell, 99 U. S. 505 ..... App. 4
Re Gustin, 281 Fed. 320 (D. C. Mich.) 90

Hake v. Strubel, 121 Ill. 321 93
Hamilton v. Moore, 3 Dall. 371 ..... App. 4
Harding v. Oregon-Idaho Co., 57 Ore 34; 110 Pac. 412 91
Harty v. Victoria, 226 U. S. 12 ..... App. 2
Herren v. Merrilees, 7 Okla. 261; 54 Pac. 467 93
Hewitt v. Equitable Life Ins. Co., 8 Fed. (2nd) 706 (C. C. A. 9th Cir.) 26
Houston v. Southwestern Telegraph & Tel. Co., 259 U. S. 318 ..... 41, 44, 46
Hovey v. McDonald, 109 U. S. 150 89
Howlett v. Tuttle, 10 Colo. 222; 15 Pac. 342 ..... App. 3
Idaho Irrigation Co. v. Gooding, 285 Fed. 453 (C. C. A. 9th Cir.) 26
Indiana D. & W. Ry. Co. v. Ditto, 158 Ind. 669; 64 N. E. 222 ..... 44, App. 2
Insurance Co. v. Lanier, 95 U. S. 171 76
Jennings v. Phila. B. & W. R. Co., 218 U. S. 255 .. .. 83, 86, 87, 89, 94, 95, 97
Re Jewell Electrical Instrument Co., 283 Fed. 978 (C. C. A. 7th Cir.) 13, 23, 26, 76, 81, 96
Kendrick v. Roberts, 214 Fed. 268 (D. C. Ga.) 90
Keyser v. Farr, 105 U. S. 265 90
Lakewood Engineering Co. v. A. W. French & Co. (Supreme Court, No. 200, Oct. Term 1927) 1, 35
Larson v. Seattle, 121 Wash. 75; 208 Pac. 54 82
L. A. Westermann Co. v. Dispatch Printing Co., 233 Fed. 609 (C. C. A. 6th Cir.) 25
McWilliams v. Ft. Stockton Irrigated Lands Co., 156 S. W. (Tex.) 556 ..... App. 1
Mallers v. Whittier Machine Co., 170 Ill. 434 93
Malony v. Adsit, 175 U. S. 281 ..... 76, 93
Mason v. Linn, 218 Pa. 161; 67 Atl. 61 ..... App. 3
Michigan Ins. Bank v. Eldred, 143 U. S. 293 .... 84, 88, 89
Miller v. Anderson, 269 Ill. 608 87
Morgan v. Chittenden Land Co., 92 Wash. 364; 159 Pac. 129 ..... 45, 93
Morrin v. Lawler, 91 Fed. (C. C. N. Y.) 693 91
Mussina v. Cavazos, 6 Wall. 355 ..... App. 4
Nadeau v. Lynch, 41 Cal. App. 755; 183 Pac. 278 .. 81
National Harness Mfg. Assn. v. Federal Trade Commission, 261 Fed. 170 (C. C. A. 6th Cir.) ... 25
Nealan v. Ring, 98 Ore. 490; 193 Pac. 747 ..... App. 7

Newton v. Consolidated Gas Co., 258 U. S. 165 ..... 41, 43, 44, 45, 59
Norton v. Brownsville, 129 U. S. 505 ..... App. 4
O'Keefe v. Beecher, 17 N. Dak. 404; 117 N. W. 353 ..... 45, App. 2
Omaha Electric L. & P. Co. v. City of Omaha, 216 Fed. 848 (C. C. A. 8th Cir.) 91
Opperman v. Petri, 107 S. W. (Tex.) 1142 ..... App. 1
Origet v. United States, 125 U. S. 240 76
Oxford & Coast Line R. Co. v. Union Bank, 153 Fed. 723 (C. C. A. 4th Cir.) ..... 92, 93, App. 6
Patterson v. Mobile Gas Co., 271 U. S. 131 44
Pearson v. Household S. M. Co., 78 Tex. 385; 14 S. W. 890 ..... App. 3
Peoples v. Evans, 50 Tex. Civ. App. 225; 111 S. W. 756 ..... App. 1
Rainey v. Grace & Co., 231 U. S. 703 ..... 29, 30
Roberts Cone Mfg. Co. v. Bruckman, 255 Fed. 957 (C. C. A. 8th Cir.) 26
Roxana Petroleum Corporation v. Rush, 295 Fed. 844 (C. C. A. 5th Cir.) 25, 44, 46
Rumfelt v. Trinity River C. & H. M. Co., 83 Cal. 649; 24 Pac. 276 ..... App. 3
Rupert v. United States, 181 Fed. 87 (C. C. A. 8th Cir.) 82
R. W. Clark Mfg. Co. v. Tablet & Ticket Co., No. 3740 (C. C. A. 7th Cir.) 41, 47, 59, 60, 71
School District v. Trotter, 10 Okla. 625; 64 Pac. 9 81
Selma & M. R. Co. v. Louisiana Nat'l Bank, 94 U. S. 253 ..... App. 2
Sibbald v. United States, 12 Pet. 488 85
Simmons v. Stern, 9 Fed. (2nd) 256 (C. C. A. 8th Cir.) 26
Smith v. Gustin, 169 Ind. 42; 81 N. E. 722 ..... App. 7
Smith v. Kunert, 17 N. Dak. 120; 115 N. W. 76 ..... 45, App. 2
Southern Bldg. & Loan Ass'n v. Carey, 117 Fed. 325 (C. C. Tenn.) 19
State v. Demarest, 110 U. S. 400 ..... App. 4
State v. Lankford, 158 Ind. 34; 62 N. E. 624 ..... App. 3
Stennick v. Jones, 282 Fed. 161 (C. C. A. 9th Cir.) 26
Struett v. Hill, 269 Fed. 247 (C. C. A. 9th Cir.) 26, 94, 97, 98
Sussex Land Co. v. Midwest Refining Co., 294 Fed. 597 (C. C. A. 8th Cir.) 94, 98

Tunnicliff *v.* Watts, 210 S. W. (Mo.) 876.....App. 7
U. S. v. Adams, 9 Wall. 554..... 54
U. S. v. Great Northern Ry., 254 Fed. 522 (C. C. A. 9th Cir.) 26
U. S. v. 337 Cases of Wine, 1 Woods 47 (C. C. 5th) 82
Vandenburgh v. Truscon Steel Co., 277 Fed. 345 (C. C. A. 6th Cir.) (aff. 261 U. S. 6)..... 25
Villalobos v. United States, 6 How. 81.....App. 4
Virginia Devel. Co. v. Rich Patch Iron Co., 98 Va. 700; 37 S. E. 280..... 93
Voges v. Davison, 306 Ill. 357.....App. 5
Wade v. Leach, 2 Fed. (2nd) 367 (C. C. A. 5th Cir.) .....25, App. 2
Wentworth v. King, 49 S. W. (Tex.) 696.....App. 1
Westermann Co., L. A. v. Dispatch Printing Co., 233 Fed. 609 (C. C. A. 6th Cir.)..... 25
Western Union v. Todd, 22 Ind. App. 701; 54 N. E. 446 .....App. 4
Wetmore v. Wetmore, 51 N. Y. St. Rep. 274.....App. 4
Whinrey v. Starr, 35 Ind. App. 623; 74 N. E. 32...App. 3
Winter v. People, 10 Colo. App. 510; 51 Pac. 1006 93
Wong Keow v. United States, 215 Fed. 95 (C. C. A. 7th Cir.) 26, 76, 77, 96
Wong Sang v. United States, 144 Fed. 968 (C. C. A. 1st Cir.) .....App. 2
Woods v. First National Bank, 16 Fed. (2nd) 856 (C. C. A. 9th Cir.) 26
Young v. City, 173 Ill. App. 311..... 93

STATUTES CITED.

Act of Sept. 24, 1789, Chap. 20, Sec. 19; 1 Stat. 73 .....19-20, 21
Act of Sept. 24, 1789, Chap. 20, Sec. 30; 1 Stat. 88 19-20
Section 269, Judicial Code 40, 41
Act of March 3, 1803, Chap. 40; 2 Stat. 244..... 20
Act of August 23, 1842, Ch. 188; 5 Stat. 518..... 20, 22
Act of Feb. 13, 1911; U. S. C. Title 28, Sec. 865; 36 Stat. 901 .....17, 29, 30

Text Books Cited.

Corpus Juris:
Volume 4, p. 247 92
Volume 4, p. 251 92
Volume 4, p. 507 39
Volume 4, p. 509 ..... 39, 40
Volume 21, p. 553 79
Volume 21, p. 706 87
Daniell, Chancery Pleading and Practice (1st Ed.) p. 666 18
Ruling Case Law, p. 677 86
Zoline, Federal Appellate Jurisdiction and Procedure, p. 646 91

IN THE

Supreme Court of the United States

OCTOBER TERM, 1927.

BARBER ASPHALT PAVING COMPANY, *Petitioner,*
against
STANDARD ASPHALT & RUBBER COMPANY, *Respondent.* } No. 194.

BRIEF FOR RESPONDENT.

SUPPLEMENTAL STATEMENT OF THE CASE.

The chronology and history of the proceedings in this case from the date of the decree of the District Court and the condition of the transcript of the record are, in our view, of controlling importance in the decision of the question now presented to this court, and as Petitioner's "Statement" omits much that we deem material to a correct understanding of the questions we submit a "Supplemental Statement."

The court, in reading this statement, will recognize controlling circumstances which differentiate this case from the other two cases pending at the October, 1927, term of this court, viz: *Lakewood Engineering Company, et al., Petitioners,* v. *A. W. French & Company, et al., Respondents,* No. 200, and *Fairbanks, Morse & Co., et al.,* v. *American Valve & Meter Co.,* No. 262.

In those cases, as we understand the record, the par-

ties entered into written stipulations providing for the incorporation into the record of all or certain parts of the evidence in the exact words of the witnesses, and the District Judge also signed certificates attached to the evidence approving the stipulated statement of evidence.

CHRONOLOGY.

1915.

Feb. 2. Patent infringement suit begun.

1917.

Feb. 20. Decree of infringement entered by District Judge Humphrey.

1921

Jan. 6. Master's report finding amount due complainant on accounting filed.

1924.

Apr. 30. Decree of accounting affirming master's report entered by Judge FitzHenry.

July 1. Appeal prayed by Barber Asphalt Paving Company; assignment of errors filed in District Court and citation issued by District Judge FitzHenry.

July 5. Supersedeas bond filed in District Court.

1925.

12 orders of the District Court, each granting a thirty-day extension of time for filing the record in the Circuit Court of Appeals, the last extension expiring July 26, 1925 (over year after issuance of citation).

Apr. 24. Appellant's (petitioner here) praecipe served (nearly 300 days after issuance of citation).

July 3. 1 copy of 9 volumes of printed record filed in the office of the clerk of the Circuit Court of Appeals.

Nov. 2. 25 printed copies of purported record filed in Circuit Court of Appeals (nearly 4 months after filing of first printed copy and 18 months after the entry of the final decree).

Nov. 9. Appellee's (respondent here) motion to Circuit Court of Appeals to dismiss appeal, etc., filed.

1926.

Jan. 29. Appellant's (petitioner here) motion to remit record to District Court for certificate of judge, allowed (the effect and validity of such certificate being reserved).

Mar. 30. Motion made before Judge FitzHenry pursuant to order of Jan. 29 (2 months' delay).

Apr. 13. Additional record filed in Circuit Court of Appeals with District Court's order (but without any signature or certificate of District Judge).

Apr. 23. Appellant (petitioner here) moved Court of Appeals to continue case to Oct. 6. Motion granted.

Apr. 29. Date set for hearing of case in Court of Appeals.

Oct. 6. Case argued orally in Court of Appeals, and motion of appellee (respondent) to dismiss appeal, etc., submitted.

Dec. 13. Order of Circuit Court of Appeals affirming decree.

Appellant (petitioner here) got together a typewritten copy of purported evidence, purporting to have been taken before Judge Humphrey on the trial of the in-

fringement issue, and before the master on the accounting issue, together with 82 out of a total of 196 exhibits shown by the typewritten manuscript to have been offered and received in evidence, and thereupon caused this purported evidence, together with the bill, answer and other documents on file and of record in the office of the clerk of the District Court, to be printed.

The typewritten transcript of the purported evidence taken before Judge Humphrey on the trial of the infringement issue bears no file mark of the District Court showing that it had ever been filed or evidencing its filing in his office. Nor did this purported transcript of the evidence bear either the certificate or the signature of the trial judge for the purpose of authenticating and identifying it as the testimony in fact taken on the trial of the cause before him. In short this testimony was never (to quote the language of Mr. Chief Justice Waite) "*made part of the record*" *Blease* v. *Garlington*, 92 U. S. 1, 7.

The purported transcript of the testimony taken before the master also bears no file mark of the clerk of the District Court, showing it to have been filed in the District Court Clerk's office, nor is there attached thereto either the certificate or signature of the master, authenticating and identifying it as the testimony taken before him together with the numerous exhibits offered and introduced in evidence on the accounting issue before the master.

After the above had been printed, the solicitors for appellant (petitioner here) served upon the clerk of the District Court and upon the solicitors for appellee a praecipe purporting to request the clerk to prepare a transcript of the record. (Rec., 42.) This praecipe, addressed to the clerk, read in part as follows:

"Please prepare a transcript of the record in the

above entitled cause for use on appeal, including therein copies of the following:"

After designating the bill of complaint and certain other documents on file and of record, the praecipe proceeds:

"Certificate of evidence, consisting of printed pages 24 to 1215 inclusive; pages 1222 to 4591 inclusive; and the following exhibits:"

Thereupon certain, but only 82 out of a total of 196 of the exhibits referred to and shown by the printed pages of purported evidence to have been offered and received in evidence were designated in the praecipe, the rest of the exhibits all being omitted. Out of the total of 196 exhibits offered and introduced in evidence, 114 are omitted from the praecipe and the printed transcript of the purported evidence, as respondent pointed out to the Court of Appeals in its answer to the appellant's petition for a rehearing and certiorari (Rec., 143) and listed in detail in its answer. (Rec., 189-196.) And moreover at least three of the exhibits designated in the praecipe were not incorporated in the transcript but were there noted only by blank pages. (See pages 1517, 1519 and 1543 of large printed record.)

Furthermore, as appears from the printed transcript of the purported evidence referred to in the praecipe itself, and as was affirmatively sworn to in the affidavit of Henry M. Paul filed in connection and as a part of appellant's (petitioner here) petition for rehearing (Rec., 111, 114), the printed transcript of the purported evidence did not contain all of the other evidence but, as Mr. Paul swears (Rec., 114) involved "*an immense amount of elimination and condensation,*" all without the knowledge or participation of the District Court or the solicitors for appellee. This was specifically called to the attention of the Circuit Court of Appeals in detail

by respondent, in its answer to appellant's (petitioner's) petition for rehearing. (Rec., 139-143.) This printed transcript of the purported evidence contained, among other things in the nine printed volumes, was not certified to nor signed by the District Court or Judge, nor was the printed purported transcript of the record certified to nor signed by the District Court or Judge. It was simply left with the clerk of the District Court with the request contained in and evidenced by the praecipe, and was not even filed in his office, nor did he put his file mark upon the same or any of the volumes in question.

This arbitrary omission of portions of the evidence and numerous exhibits was not done under the supervision of any judge or court but was done solely under a power assumed and exercised by appellant's (petitioner's) solicitors.

In obedience to the praecipe, the clerk of the District Court simply attached his certificate near the end of the ninth volume, on page 4876, as follows:

> "I, S. T. Burnett, Clerk of the District Court of the United States for the Southern District of Illinois, and keeper of the records and Seals thereof, do hereby certify the foregoing to be a true and complete transcript of the proceedings had of record in said Court, consisting of nine (9) volumes, paged from 1 to 4877 inclusive, in a certain cause entitled Standard Asphalt & Rubber Company, a corporation, vs. Barber Asphalt Paving Company, a corporation, No. 25, in Equity, said transcript having been prepared in accordance with praecipe filed therein, as fully as the same appear from the records of said Court now remaining in my custody and control."

This printed purported transcript of the record, consisting of nine printed volumes of 4907 pages, in no way connected by cross-identification or otherwise, and with this certificate of the clerk at practically the end of the

last volume, and no certificate on any of the other volumes, was filed by appellant (petitioner here) in the office of the clerk of the Circuit Court of Appeals. The printed purported transcript of the record was never filed, even after it was certified to, as stated, by the clerk of the District Court, in the office of the clerk of the District Court.

The clerk does not certify that the copy of the evidence in the printed transcript from page 24 to page 1577 is a true copy of the evidence taken and heard by Judge Humphrey nor that it is a true copy of the evidence filed in his office, nor *a fortiori* that it contains all the evidence taken or heard by Judge Humphrey upon the infringement issue but merely that it is a transcript prepared in accordance with a praecipe. It is therefore neither a certificate of evidence nor is it a statement of the evidence prepared under the supervision of the District Judge under Rule 75.

Nowhere in the printed volumes purporting to be a transcript of record is there included any certificate of the master purporting to show that the evidence which the appellant has embodied in the transcript was in fact taken or heard by him and the transcript does not contain anything showing that it was *all* the evidence taken or heard by the master.

It is not on its face *all* of such evidence but is admittedly deleted and expurgated by the petitioner's solicitor without supervision by the court and without the knowledge or consent of appellee (respondent here).

The clerk does even not certify that it is the evidence heard by the master nor even that it was evidence attached to or returned with the master's report or filed by the master in the clerk's office as such nor does this evidence purport to bear any file mark of the District Court clerk.

On the contrary the affidavit of Mr. Paul, solicitor for appellant, sets forth that he (without consulting the District Judge or appellee) had *"carefully eliminated a great deal of the accounting record"!* No authority for his extraordinary action is cited in his affidavit or otherwise.

The District Court or Judge never attached his certificate or signature to any of these printed volumes or purported transcript of the record. Neither this printed purported transcript of the record, nor any other purported transcript of the record or of the evidence, or any certificate of evidence was ever presented to the District Court or Judge, or was ever approved by him, nor did he ever attach his certificate or signature thereto.

All that was ever done by appellant's (petitioner's) solicitors was to obtain the certificate of the clerk above noted, near the end of the ninth volume, and then to file the nine printed volumes (eight uncertified) in the office of the clerk of the Circuit Court of Appeals.

No effort whatever was made by solicitors for appellant (petitioner here) to comply with Equity Rule 75 prior to filing the nine printed volumes in the office of the clerk of the United States Circuit Court of Appeals. They did not, as Rule 75 requires,

(a) Prepare a condensed statement of the evidence in narrative form;

(b) They did not lodge this statement in the clerk's office of the District Court (at or before filing their praecipe, or at any other time);

(c) They did not serve notice on appellee's solicitors of such lodging, nor name the time and place when appellee's solicitors would ask the court or judge to approve the statement;

(d) They did not present any statement of the evidence, either in condensed or uncondensed form, to the District Court or Judge, and no hearing was had by him of the parties;

(e) The District Court or Judge never had the

opportunity to find that any statement of the evidence whether condensed or uncondensed, was "true, complete and properly prepared," nor was any such statement of the evidence ever approved by the District Court or Judge and thereupon filed in the District Court clerk's office and thereby "become a part of the record for the purposes of the appeal" or otherwise.

On November 9, 1925, one week after respondent's solicitors were served by the clerk of the Circuit Court of Appeals with a copy of the printed purported transcript of the record, respondent filed and presented to the Court of Appeals its motion to strike and its objections to the purported evidence and testimony (Rec., 52-57), on the ground, among others, that the purported evidence set forth in said *printed purported transcript of the record was never approved by the District Court or Judge nor signed, certified to nor authenticated by him and never filed with such approval, certification or authentication in the office of the clerk of the district and never became a part of the record in said cause for the purposes of the appeal therein, all as required by Equity Rule 75; and insisting that in consequence thereof the purported proceedings and evidence should be stricken from the purported transcript of record and disregarded by the Court of Appeals.*

The motion and objections were, on November 9, 1925, taken by the court (Rec., 57, 58) and continued to the hearing of the cause.

On January 4, 1926, nearly two months after respondent's motion and objections were filed, petitioner filed its motion in the United States Circuit Court of Appeals (Rec., 58) for leave to remit the certified transcript of the record filed on July 3, 1925, to the District Court for the purpose of securing the certificate of the District Court to the purported evidence in the printed transcript.

On January 8, 1926, the court directed petitioner and respondent to file their briefs in support and in opposition to the foregoing motion of petitioner.

On January 18, 1926 petitioner filed its brief in support of its motion accordingly. Excerpts from this brief appear in respondent's answer to petitioner's petition for rehearing (Rec., 130-132) from which it appears that solicitors for appellant (petitioner here) had full cognizance of Equity Rule 75 and argued against its enforcement and in opposition to appellee's (respondent here) motion and objections because of the violation of Equity Rule 75.

On January 26, 1926 appellee (respondent here) filed its brief in support of its motion and objections and, as appears from the excerpts from this brief found in its answer to appellant's petition for rehearing (Rec., 128, 130) insisted upon and argued for the enforcement of Equity Rule 75.

We quote the following passages from appellee's (respondent here) brief.

Page 17 it was said,

> "Under Equity Rule 75 appellee's counsel *have a right to be heard* on the settling of the Certificate of Evidence. Manifestly, the Rule does not contemplate an arbitrary power in the District Court, or in the Court of Appeals to direct the District Court to settle the Certificate of Evidence, and thereupon approve and certify and sign the same, *without giving counsel for appellee an opportunity to make the showing provided for in the Rule itself.*"

Again on page 23 it was said,

> "This language is peculiarly applicable to the provisions of Equity Rule 75, providing the manner in which the evidence taken in equity causes shall be settled and approved, *involving a judicial hearing*, participated in by both parties, and consideration and action by the Court.

The order requested by appellant cannot properly be entered, because in any event the evidence under Equity Rule 75 must be settled, approved, certified and filed in the manner provided by this Rule, which involves giving appellee an opportunity to be heard, and judicial consideration and determination by the District Court."

And still again on page 31 we said,

"Counsel refer to this complete omission to comply with Equity Rule 75, or to obtain the certification of the trial Judge to the purported evidence in the transcript of the record so as to make the same a part of the record in the cause as 'a purely technical omission.' The Supreme Court of the United States and other Federal Courts to which we have called attention do not so regard this omission, but on the contrary characterize it as *a grave matter.*"

And on page 34, and 35, we said,

"Equity Rule 75 was *violated in letter and in spirit* in that **the testimony was not reduced to narrative form**, and *presented to counsel for appelle* so that the same might be settled and approved by the Court in the manner contemplated by the Rule **and thereby be made a part of the record.**

Not only this, but appellee's counsel *were never tendered a Certificate of Evidence*, or *given an opportunity to examine or to be heard* concerning the purported evidence and numerous exhibits incorporated in the transcript of the record on file. *Counsel for appellee were totally ignored*, and *the first opportunity they had to know of the action of counsel for appellant* was when the printed record was served upon them, and *this was after the purported transcript of the record had been filed*, and *the whole situation closed so far as counsel for appellee were concerned.*"

On page 40 we said,

"Counsel say again that it was some time after the adoption of Equity Rule 75 before the Bar understood that the Court's certification of a *condensed statement of evidence* also applied to those

cases where, either by agreement of counsel, or order of court, the entire record was sent up on appeal."

And on page 41, we said,

"Under Equity Rule 75, however, certain specific things were required of counsel for appellant before counsel for appellee could be required to move or to do anything. None of these things were done, and no attempt at compliance with the Rule was made by counsel for appellant. *Counsel for appellee were not asked to, or given any opportunity to participate.*"

We quote the following for the court's ready reference from appellant's (petitioner's) brief in support of its motion to remit the record for certification.

On page 3, appellant said,

"3. Until July 1, 1924, there was no appellant, and accordingly, no one upon whom Rule 75 of the Supreme court, Equity Rules cast the duty of *condensing the evidence* as taken at the trial. In the meantime, on June 14, 1918, Judge Humphrey died, and in view of the nature of the controversies at the trial, and the conflicting views of the parties upon many points, it was not feasible to attempt *to settle a condensed statement of the evidence* before a Judge not thoroughly familiar with the trial of the cause, and accordingly, it was deemed best to ask the Clerk of the Court to certify the stenographer's notes of the testimony and proceedings at the trial, as already filed of record in the cause."

On page 11, appellant said,

"No such a thing as a Certificate of Evidence was known in Federal Equity practice *until after the promulgation, November* 4, 1912, of the Supreme Court Equity Rules, and particularly Rule 75-B thereof. All that was required was that the testimony be taken down and preserved in the record. *Blease* v. *Garlington*, 92 U. S. 1.

But even after the adoption of Rule 75-B the Bar did not *at once* understand, and it was *sometime before the Courts ruled*, that the requirements for the

> Court's certification of a *condensed statement* of evidence also applied to those cases where, either by agreement of counsel or order of Court, the entire record was sent up to the Court of Appeals."

And continuing counsel for appellant (petitioner here) said, (page 11):

> "Uncertainty still exists upon this subject, for there is a diversity of ruling in different circuits."

On page 16, counsel for appellant said:

> "There has been no negligence on the part of appellant's counsel in this case. *At most there has been a pardonable oversight.* All of the cases which have been cited make it clear that the duty to procure the trial Judge's certification of the evidence is founded upon Equity Rule 75. (See Judge Baker's opinion in this circuit *In re* Jewell Electrical Instrument Co.). Judge Baker's language is very precise in speaking of this, (283 Fed. 978, 980) as 'Appellant's duty'; for by the express terms of the Equity Rule no duty rests upon anyone until there is an 'Appellant.' *If the testimony is to be condensed* 'the Appellant' must first attempt that duty and then 'the Appellee' if dissatisfied. Therefore, no duty in this respect rested upon anybody until there was an appellant; that is, until July 1, 1924, or six years after Judge Humphrey died."

It appears from the excerpts in question of the briefs of petitioner and respondent, that petitioner and its solicitors were fully admonished of their violation of Equity Rule 75 and that respondent insisted upon compliance therewith.

On January 29, 1926, an order was entered by the United States Circuit Court of Appeals (Rec., 64) granting appellant's (petitioner's) motion for an order remitting the transcript of the record to the District Court the order providing, however,

> "that the effect and validity of such certificates if obtained shall be reserved for final determination of this cause."

On March 30, 1926, two months after the order of the United States Circuit Court of Appeals authorizing the transmission of the certified transcript of the record for further certification, appellant (petitioner here) appeared before and presented to the District Judge a form of order, which on motion of appellant the District Court signed and entered. (Rec., 48-50.)

As the order recites (Rec., 48) solicitors for appellee (respondent here) appeared before the District Judge

> "specially, solely and only for the purpose of challenging the power and jurisdiction of the court to entertain the motion herein and to grant the relief herein prayed."

Solicitors for appellant (petitioner here) did not put the testimony in narrative form nor present it to the District Court or Judge and ask for its approval. They did not ask the District Court or Judge to attach or append a certificate signed by him to the transcript of the record or to the evidence purported to be contained therein, certifying that such evidence was, in the language of Equity Rule 75, "true, complete and properly prepared" nor anything of that kind, nor did they even ask the District Court or Judge to attach his signature to any part of the transcript of the record or the evidence therein, and the District Court or Judge did not do so, although the order of the Circuit Court of Appeals contemplated, as the quotation therefrom above shows, that a certificate signed by the judge should be "*affixed to the transcript*" and when so certified the transcript should be returned to the Circuit Court of Appeals. All they did was simply to ask for and have entered the order referred to.

On April 10, 1926, after this order of March 30, 1926, had been entered, the nine printed volumes of purported transcript of the record (without any certificate

or signature by the District Judge and without having been filed in the District Court Clerk's office) were returned to the Circuit Court of Appeals by appellant's solicitors, together with a certified copy of the order of March 30, 1926, which purports to have been entered of record in the District Court in a cause which was then and had been for at least nine months pending in the Court of Appeals. (Rec., 65.)

The court, as the order recites, did this not on its own motion or initiative but at the request of appellant (petitioner here), without any showing or finding that the evidence could not have been properly and safely condensed and put in narrative form for the purposes of the appeal and review.

The order in question contains the recital (Rec., 49) that

> "pages 24 to 4872, inclusive, of the transcript of the record heretofore certified by the Clerk of this Court on June 29, 1925, amended and supplemented as herein directed, are hereby approved as a true, complete and properly prepared statement of the evidence (including testimony and exhibits therein referred to and the stipulation of the parties) in the above entitled cause."

Notwithstanding this statement, it appears from the purported evidence itself that the evidence incorporated in the printed transcript is not true and complete but, on the contrary, that it is incomplete and that a large number of exhibits, 114 out of a total of 196, are omitted, and that the transcript is in other respects incomplete. Furthermore, the affidavit of Mr. Paul, appellant's solicitor, attached to the petition for rehearing (Rec., 38) admits that the purported transcript of the testimony is not complete, notwithstanding the statement in the order.

The order contains the further recital (Rec., 49),

"and *upon request of the said defendant*, the said

Barber Asphalt Paving Company, the Court hereby directs that all the testimony in this cause be reproduced in the exact words of the witnesses, and not in narrative form."

On October 6, 1926, appellee (respondent here) filed additional grounds for dismissal of the appeal (Rec., 65) namely, that the order of March 30, 1926, was void, the District Court lacking jurisdiction; that there was no certificate of the District Judge and that the evidence had never been certified or made a part of the record; that 114 out of a total of 196 exhibits received in evidence on the infringement and on the accounting issues were not in the purported transcript of the record and evidence and were never certified to or filed in the office of the clerk of the District Court.

Thereupon the motions and objections of appellee (respondent here) and the argument of the cause on its merits came on for hearing, appellee (respondent here) insisting that it stood upon its motions and objections. Notwithstanding this, appellant (petitioner here) did nothing, but proceeded with the argument on the merits.

On December 13, 1926, the decision of the United States Circuit Court of Appeals affirming the decree was rendered and the order of affirmance was entered.

Every assignment of errors on the appeal to the Circuit Court of Appeals (Rec., 1219, 4680) is based on the evidence and involves a question of fact.

PETITIONER'S POINT I.

(A) Petitioner's contention as to the validity of Equity Rule 75 is, in our view, wholly unsound and due to a misconception of the proper functions of a court of equity and the scope of its inherent power with respect to its control over its records and its decrees and a misunderstanding of the rules of the Circuit Court of Appeals of the Seventh Circuit. The quotation in the brief of Petitioner about original certificates of evidence was not in the rules when this appeal was perfected. The rule then in force related only to writs of error and by Rule 8 the court adopted the practice of the Supreme Court.

(B) Petitioner's contention that it complied with all the rules of the Circuit Court of Appeals in this case is incorrect. Its quotation of the rule is incorrect. The rule quoted was not in effect when this appeal was perfected.

(C) Petitioner's contention that Section 865 of Title 28 of the United States Code (Act of February 13, 1911: 36 Stat. 901) limits the power of this court (with respect to appeals to and writs of error from the Circuit Court of Appeals) to prescribe only the form of the printed transcript of record of the lower court and that Congress by that act delegated the power of condensation of the record to the Circuit Court of Appeals is a narrow and unjustifiable construction of the act.

Petitioner's argument on this point, is in our view not only unsound but is based upon a false premise with respect to the rules of the Circuit Court of Appeals of the Seventh Circuit.

Under Point I of its brief petitioner contends, in sub-

stance, that Equity Rule 75 is an unwarranted invasion by this court of the province and power of the Circuit Court of Appeals and is an unjustified attempt to regulate the practice in that court on appeal unless or until the Circuit Court of Appeals of each circuit has by formal enactment, and not otherwise, adopted that rule as its own.

Power of courts of equity to determine in what form evidence heard in proceedings shall be preserved in their records.

We do not think it will be seriously disputed that courts of equity of the United States have and have always had the power to decide and determine how and in what form the evidence heard in an equity proceeding shall be preserved and become a part of the record in that proceeding.

Up to and at the time the practice in the High Court of Chancery in England was adopted in the federal courts, oral testimony was not heard in that court, with the exception of the proof of the handwriting of deeds or other documents where no cross-examination was required.

The practice with respect to preserving the oral testimony so heard in the English High Court of Chancery is involved in some obscurity, but the substance of evidence embodied in depositions taken before masters or examiners was, by the Court of Chancery, embodied in the decree.

Mr. Daniells, in his work on Chancery Pleading and Practice, 1st Ed., page 666, says:

> "It may be noticed here, that the practice of the court of chancery, with regard to stating in the decree the evidence entered in the cause, *is merely to state it generally without specifying the particular*

depositions which had been made use of." (Italics ours.)

The practice evidently was for the reviewing court to look to the decree to determine whether the court of chancery had committed error, and the chancery court in entering its decrees recited the evidence upon which its findings were based. (See discussion of early practice by Hammond, Circuit Judge, in *Southern Building & Loan Association* v. *Carey*, 117 Fed. 325, at 331.)

When Congress by the Act of September 24, 1789 (1 Stat. 73), established courts of equity, it gave them power to hear oral testimony. (Sec. 30, Chap. 20.) In Section 19 of that act Congress expressly provided the manner in which the evidence should be incorporated into their records by courts of equity. Section 19 is as follows:

> "Be it further enacted that it shall be the duty of circuit courts, in causes in equity and of admiralty and maritime jurisdiction *to cause the facts on which they found their* sentence or *decree, fully to appear upon the record* either from the pleadings and decree itself, *or a state of the case agreed by the parties, or their counsel, or if they disagree by a stating of the case by the court.*"

It will thus be observed that the very first act enacted by Congress creating inferior courts, pursuant to the Constitution, regulated the practice and procedure in courts of equity created by that act and made it the duty of the newly created courts of equity to cause the facts on which they found their decrees fully to appear upon the record, either from the pleading and decree itself (as had been the English practice) or a statement of the facts agreed upon by the parties, or if they disagreed such statement was to be prepared by the court.

Congress thus in the act creating courts of equity clothed them with the power to prepare a statement of

the facts upon which they based their decree, which in its very nature was not only an extraneous document separate from the decree, *but inherently and necessarily a statement of the facts in condensed or narrative form.*

It is worthy of note that the ultimate power to determine the facts in the form of a statement upon which the decree rests was vested in the Circuit Court (the court of equity,—not a reviewing court).

The Act of March 3, 1803, Chap. XL, 2 Stat. 244, amending Sections 19 and 20 of the Act of September 24, 1789, was held by Chief Justice Marshall, in *Conn.* v. *Penn*, 5 Wheat. 424, to repeal the practice provision with reference to the preparation of a statement of facts in equity cases under the supervision of the equity court, but as the distinguished Chief Justice points out in the opinion in that case, the Act of 1803 did not substitute any method of preserving oral testimony in equity cases.

This uncertainty with reference to incorporating oral evidence into the record in equity cases continued until, pursuant to the authority of the Act of Congress of August 23, 1842, Ch. 188, 5 Stat. 518, which is as follows:

> "The Supreme Court shall have power to prescribe, from time to time, and in any manner not inconsistent with any law of the United States, the forms of writs and other process, the modes of framing and filing proceedings and pleadings, of taking and obtaining evidence, of obtaining discovery, of proceeding to obtain relief, of drawing up, entering, and enrolling decrees, and of proceeding before trustees appointed by the court, and *generally to regulate the whole practice, to be used*, in suits in equity or admiralty, by the circuit and district courts,"

this court enacted Equity Rule 75 providing for the preservation of evidence in narrative form under the supervision of the District Court.

The promulgation by this court of an equity rule directing the method and manner of preserving of record in the District Court the evidence in equity cases in narrative form is clearly a regulation of the practice in courts of equity, just as was Section 19 of the Act of Congress of September 24, 1789, providing that it should be the duty of the Circuit Courts in causes of equity jurisdiction to cause the facts on which they found their decree, fully to appear upon the record, either from the decree itself or a state of the case agreed by the parties, or their counsel, or if they disagreed a stating of the case by the court.

Section 19 of the Act of Congress of September 24, 1789, is not and does not purport to be a regulation of the practice in the Appellate, that is, the Supreme Court, but is and purports to be a regulation of the practice of the Circuit Court in causes in equity and admiralty jurisdiction.

Counsel for petitioner would hardly, we submit, contend that Section 19 of the Act of September 24, 1789, was not what it purported to be, but in reality was a regulation of the practice in this court (Supreme Court) on appeal in equity and admiralty cases. Yet substantially the same procedure which Section 19 of the Act of 1789 prescribes with respect to the preservation of the facts upon which decrees in equity causes are based, is prescribed by Equity Rule 75, under the broad powers delegated to this court by Congress "generally to regulate the whole practice to be used in suits in equity."

As, according to the Act of Congress of 1789, the determination of the facts upon which the decrees in equity causes were based, and therefore the determination of what was to be a part of the record in equity causes, was vested in the Circuit Court (which was then

the only federal equity court in existence), so the determination of "the evidence to be included in the record" for use on appeal, as prescribed by Equity Rule 75, is vested, and properly so, in the present District Court of equity, pursuant to Equity Rule 75, to determine what evidence shall be included in the record; and to provide that it shall be set out in narrative form is a function of the court of equity.

Equity Rule 75 does not purport to vest in the court of equity the power to *omit* or *delete* evidence, but merely to state it in "simple and condensed" and "only in narrative form."

The statement of the evidence must be "*true*" and "**complete,**" and if it is not "*true*" and "**complete**" it is required to be made so under the direction of the court or judge before he approves it and thereupon causes it to be filed and made a matter of record. There is nothing in Equity Rule 75 which purports to delegate to courts of equity the power to omit any evidence from the record.

Under the Statute of August 23, 1842, the Supreme Court has ever since promulgated the rules of practice for the courts of equity of the United States, and these Rules of Practice apply and are directed specifically to the district courts.

Equity Rule 75 is directed to the judges and the clerks of the district courts and prescribes the practice in such courts in the matter of preserving the evidence and testimony, and making the same a part of the record in the district courts for the purposes of appeal.

As is well known, prior to the adoption or promulgation of Equity Rule 75 on November 4, 1912, the proper method of preserving the evidence in an equity cause and making the same a part of the record in the Dis-

trict Court was involved in very grave doubt. It was the subject matter of debate and discussion in the District Courts and in the Courts of Appeals and in the textbooks. This was particularly true of testimony taken in open court.

Equity Rule 75 was, no doubt, promulgated to settle this uncertainty and answer this question.

Buessel v. *U. S.*, 258 Fed. (C. C. A. 2nd Cir.) 811, 822, 823.

Since the adoption of Equity Rule 75, there is only one way in which the testimony taken in an equity cause can be made a part of the record of the District Court for use on appeal, and that is the manner prescribed by the rule itself.

Every requirement of Rule 75 must be complied with or there is no record of the evidence that can be certified up and used on appeal. The burden is put upon the party intending to appeal, or, in other words, the appellant, to put the evidence and testimony of witnesses in condensed and narrative form, and after it shall have been found by the District Court to be "true, complete and properly prepared" and thereupon *approved* and certified to by him, it shall, as the rule specifically provides, "*be filed* in the clerk's office and *become a part of the record* for the purposes of appeal," that is to say, be filed in the office of the clerk of the District Court and become a part of the record of the District Court for the purposes of the appeal.

Until it is thus made part of the record of the District Court it cannot be considered by the Court of Appeals.

In *In re Jewel Electrical Instrument Co.* 283 Fed. (C. C. A. 7th Cir.) 978, 980, it was said that, *regardless of what the proper practice was under former equity rules,*

"* * * under present Equity Rule 46 respect-

ing oral testimony in open court, and Equity Rule 75, concerning an appellant's duty to procure the trial judge's certification of the evidence (*like a bill of exceptions on the law side*) and his duty to file it with the clerk of *the trial court*, and his duty to include within his praecipe those portions of the record which establish the existence of error in the decree, there is no room for contending that error must be presumed."

So in *Buessel* v. *U. S.* 258 Fed. (C. C. A. 2nd Cir.) 811, where this subject was fully examined, the court said, among other things (p. 822):

> "*The Supreme Court has the power to regulate the practice in suits in equity in the Federal courts.* This it has done by the equity rules promulgated on November 4, 1912. *The matter of the record on appeal is regulated by Rule 75.*"

And continuing, the court said (p. 823):

> "It is evident that *it was not intended that the testimony should become a part of the record* without the approval of the judge, and until it has been approved by him, it is *not a part of the record* for the purposes of an appeal, and, *as the testimony in the transcript in this case is not there in conformity to Rule 75, we cannot consider it.*"

And still continuing, the court said (page 824):

> "We may add that, *whatever may or may not have been the practice in this circuit prior to* 1912 in the matter of preparing the record in an appeal, the subject is governed by Rules 75, 76 and 77, as framed by the Supreme Court, and that *there is no power in this court to exempt a particular case from their operation.* The rules, having been promulgated under the authority of an act of Congress, *have the authority of statutory regulation.*"

No Circuit Court of Appeals of any Circuit, so far as we are aware, has ever held that Equity Rule 75, so far as it provides that the evidence should be put into narrative form in the manner and under the conditions pro-

vided by it, was in excess of the power of the Supreme Court.

The various Circuit Courts of Appeals have not only not questioned the validity of Equity Rule 75, but practically all of them have affirmatively recognized it as a valid enactment and controlling on them.

Thus, in *Buessel* v. *United States*, 258 Fed. 811, the Circuit Court of Appeals of the Second Circuit has recognized the rule, as shown by the foregoing excerpts:

In the Fifth Circuit, the rule has been expressly recognized as binding in a series of cases.

Coxe v. *Peck Williamson H. & V. Co.*, 208 Fed. 409.

Carson v. *Hurt*, 250 Fed. 30.

Roxana Petroleum Corporation v. *Rush*, 295 Fed. 844.

Wade v. *Leach*, 2 Fed. (2nd) 367.

Buckeye Cotton Oil Co. v. *Ragland*, 11 Fed. (2nd) 231.

In the Sixth Circuit, Equity Rule 75 was specifically recognized in Rule 15 of that circuit, but not "*adopted*," as counsel for petitioner say.

Re Equity Rule 75, 222 Fed. 984.

Garland v. *Quinn*, 242 Fed. 267.

Nat'l Harness Mfg. Assn. v. *Federal Trade Com.*, 261 Fed. 170.

L. A. Westermann Co. v. *Dispatch Printing Co.*, 233 Fed. 609.

Firestone Tire & Rubber Co. v. *Seberling*, 235 Fed. 891.

Vandenburgh v. *Truscon Steel Co.*, 277 Fed. 345 (aff. 261 U. S. 6).

Goodwin v. *U. S.*, 295 Fed. 856.

In the Seventh Circuit, it was expressly recognized, prior to the decision in the case at bar, in the following:

Wong Keow v. *U. S.*, 215 Fed. 95.

Re Jewell Electric Inst. Co., 283 Fed. 978.

In the Eighth Circuit, in *Roberts Cone Mfg. Co.* v. *Bruckman*, 255 Fed. 957, the court refers to Rule 75 as "a rule of this Court."

It was also recognized in

Brictson Mfg. Co. v. *Close*, 280 Fed. 297.

Simmons v. *Stern*, 9 Fed. (2nd) 256.

In the Ninth Circuit, it was recognized in the following cases:

U. S. v. *Great Northern Ry.*, 254 Fed. 522.

Struett v. *Hill*, 269 Fed. 247.

Stennick v. *Jones*, 282 Fed. 161.

Bacon v. *Neill*, 283 Fed. 717.

Idaho Irrigation Co. v. *Gooding*, 285 Fed. 453.

Hewitt v. *Equitable Life Ins. Co.*, 8 Fed. (2nd) 706.

Woods v. *First Nat'l Bank*, 16 Fed. (2nd) 856.

Counsel for petitioner, in their brief (page 8), urge that:

> "Rule 75 of the present Equity Rules of the Supreme Court, while operative to control the practice of the district courts in relation to the condensation of records upon appeals direct from those courts to the Supreme Court, cannot, in accordance with the terms of the statute, become operative upon appeals from a final decree of the district court to a circuit court of appeals *until the latter has by rule promulgated Rule 75 as its own.*"

At the time the appeal in this case was perfected and the Circuit Court of Appeals acquired jurisdiction, Rule

8 of the Circuit Court of Appeals of the Seventh Circuit provided that:

> "The practice, so far as may be, shall be the same as in the Supreme Court of the United States."

At the time this appeal was perfected there was no rule of the Circuit Court of Appeals specifically governing the preparation of a transcript of the record or a certificate of the evidence on appeal in equity. Counsel for petitioner, in their brief (page 7) quote the rule as subsequently amended (October 6, 1925), but which did not control this appeal.

The words "Whenever an appeal is allowed, the clerk shall return the original certificate of evidence when signed by the judge who tried the cause" were not in Rule 14 at the time this appeal was perfected, and the rule in question related only to writs of error and the practice in reference to bills of exceptions.

There being no rule of the Circuit Court of Appeals then in effect with reference to appeals and certificates of evidence, it seems clear that the practice of the Supreme Court (pursuant to Rule 8) was adopted as controlling in the Circuit Court of Appeals.

(B) Petitioner's contention that the Circuit Court of Appeals had not adopted Rule 75 but had a rule of its own in conflict therewith and that it complied with all the rules of the Circuit Court of Appeals in this case is incorrect. Its quotation of the rule is incorrect. The rule quoted was not in effect when this appeal was perfected. Under Rule 8 the Circuit Court of Appeals adopted the practice of the Supreme Court.

Under Point One of their brief, counsel for appellant contend that on appeal from a District Court to a Circuit Court of Appeals, the condensation of the record of

the District Court is governed by the rules of the Circuit Court of Appeals, "*all of which rules were complied with in this case.*"

Paragraph 1 of Rule 14 of the Rules of the Circuit Court of Appeals for the Seventh Circuit in force at the time the appeal was perfected was as follows:

> "The clerk of the court, to which any writ of error may be directed, shall make a return of the same by transmitting a true copy of the record, bill of exceptions, assignment of errors, and all proceedings in the case (necessary to the hearing in this court), under his hand and the seal of the court. The clerk may require of the appellant or plaintiff in error a written praecipe stating in detail what the transcript shall contain, and when a praecipe is filed shall insert a copy thereof in the transcript."

That part of the rule quoted in the petitioner's brief, as follows,

> "Whenever an appeal is allowed the clerk shall return the original certificate of evidence when signed by the judge who tried the cause,"

was not in the rules at the time this appeal was perfected and, as the court will see, the rule covered the practice only on writs of error, there being no specific provisions with reference to the transcript of record or certificate of evidence on appeal, in equity. In this situation the practice on appeal was in accordance with Rule 8 of the Circuit Court of Appeals providing that

> "the practice, so far as may be, shall be the same as in the Supreme Court of the United States,"

regulated by Equity Rule 75.

As it has never been contended by counsel for the petitioner that they complied with Equity Rule 75 and as they are under misapprehension as to the rule of the Circuit Court of Appeals in effect at the date of the appeal in this case, it seems to follow that their argu-

ment that the Circuit Court of Appeals had not adopted the practice provided by this court and particularly by Rule 75 and had some rule in conflict therewith which the petitioner had complied with is absolutely incorrect and based on a misapprehension of those rules.

(C) Petitioner's contention that Section 865 of Title 28 of the United States Code (Act of February 13, 1911: 36 Stat. 901) limits the power of this court) with respect to appeals to and writs of error from the Circuit Court of Appeals) to prescribe only the form of printed transcripts of record of the lower court and that Congress by that act delegated the power of condensation of the record to the Circuit Court of Appeals is a narrow and unjustifiable construction of the act.

ACT OF FEBRUARY 13, 1911.

It is insistently urged by counsel for appellant that the Act of February 13, 1911 (36 Stat. 901, being Section 865 of Title 28 of U. S. Code) authorizes this court only to regulate the "form of the printed transcript" and they urge this is quite a different matter from condensing the proofs, a matter which by that act Congress has delegated to the Circuit Court of Appeals.

The construction sought to be placed by petitioner's counsel on the Act of February 13, 1911 is, we think, entirely too narrow, notwithstanding what this court said in *Rainey* v. *Grace & Co.* 231 U. S. 703, 708.

It is clear, we think, from a reading of Section 1, that the words "in such form as the Supreme Court of the United States shall by rules prescribe" grammatically applies both to transcripts of the record and to the "part or abstract of the proofs."

Certainly, the first section of the Act of February 13,

1911, which relates only to practice on appeal to and writ of error from the Circuit Court of Appeals embodies a grant of power to this court, in addition to any powers previously granted by Congress to this court, with respect to proceedings in the Circuit Court of Appeals. In *Rainey* v. *W. R. Grace & Co.* 231 U. S. 703, the sole question certified by the Circuit Court of Appeals to this court was whether the clerk of the Circuit Court of Appeals could, since the Act of February 13, 1911, charge a fee for printing the transcript of record or whether by that act the clerk's fee for printing transcripts was abolished.

The purpose of enacting the Act of February 13, 1911 is made quite clear, but this court was not then considering the question of the full extent of the power delegated to this court by that act. Therefore, while the statement in the opinion of this court that "the form in which the transcript shall be printed, the Act provides shall be prescribed by this Court" is correct, it is also true that in the act itself the words "in such form as the Supreme Court of the United States shall by rule prescribe" refer just as much to the preceding words "and of such part or abstract of the proofs" as it does to the words "printed transcripts of the record." In other words, while it is quite true that the act provides that the form in which the transcript shall be printed shall be prescribed by this court, it is also true that this court is also authorized to prescribe the form with reference to the proofs. Certainly this court did not, in the three rules, say, nor did it, we believe, intend, that what it said with respect to the Act of 1911 was the result of authority delegated to this court by that act. No question as to the form of proofs was before the court for consideration nor was it necessary to act in any way involved in the decision.

In the present case, the question of the scope and meaning of the power delegated to this court with respect to the form of proofs, is presented for decision. The question, as we view it, is not in conflict with anything said by this court in the Grace case but relates to a portion of the statute not passed upon by this court in that case. Certainly, some power is delegated to this court by that act with respect to the *form* of "proofs" to be embodied in the record, and, so far as it relates to *form*, this court is given a power which is just as extensive, so far as the subject matter is concerned, as that granted to the Circuit Court of Appeals.

PETITIONER'S POINT II.

It is contended that the Judge of the District Court has certified that the record, as presented to the Circuit Court of Appeals, "is true, complete and properly prepared," and that in consequence, the Appellate Court should not have held that no evidence was properly before it.

In the case at bar, as we pointed out in our Supplemental Statement, the printed transcript of the record, including the unnumbered purported evidence, was not presented to or approved by the District Court or Judge, or found or certified by him to be "true, complete and properly prepared" before it was originally filed by the appellant (petitioner here) in the office of the clerk of the Circuit Court of Appeals on July 3, 1925.

After the motion to dismiss had been filed by appellee (respondent here), on November 9, 1925, appellant (petitioner here), by leave of the Circuit Court of Appeals granted January 28, 1926 (Rec., 64), presented to the District Court or Judge, on March 30, 1926, the original transcript of the record filed in the office of the clerk of

the United States Circuit Court of Appeals on July 3, 1925, and a prepared order. (Rec., 48.) The District Judge signed and entered this order, as prepared and presented, on March 30, 1926, which contains the provision that the printed pages of evidence in the original transcript of the record in question (Rec., 48) as amended and supplemented by the order, is "approved as a true, complete and properly prepared statement of the evidence (including testimony and exhibits therein referred to, and the stipulation of the parties)."

That it was not a "properly *prepared* statement of the evidence," etc., that is to say, *condensed* and *put in narrative form*, in accordance with Equity Rule 75, cannot be disputed. In fact, the order in question specifically provides (Rec., 49) that upon the "*request* of the said defendant (the said Barber Asphalt Paving Company), the court hereby directs that all the testimony in this case be reproduced *in the exact words of the witnesses and not in narrative form.*"

The question presented therefore is whether or not, because of this statement in the order, contrary to the fact, the Court of Appeals was nevertheless required to consider the evidence or had a right to disregard and to refuse to consider the evidence thus presented to it; or whether the District Court or Judge, at the request of the appellant and over the protest of appellee, had the right or power to disregard and abrogate Equity Rule 75 or, as contended by petitioner, whether the Court of Appeals was powerless to do anything, despite this flagrant violation of Equity Rule 75, but to send back the record with directions to the District Court or Judge to obey the rule and thereby to delay still further the termination of the cause and to impose great additional expense and annoyance upon the protesting appellee.

The Court of Appeals held, and we submit, properly held, in the very nature of things and in the light of the decisions of the Supreme Court, and other federal courts, that (Rec., 74), "It is not within the power of the District Court or Judge to make such an order," or to approve such a statement of evidence, in utter disregard and violation of the letter, as well as the spirit, of the rule, and that, therefore, it had a right to wholly disregard the evidence thus presented.

The cases cited and quoted from in the opinion of the Circuit Court of Appeals, we respectfully submit, clearly sustain its holding and action.

The case at bar does not present a matter of discretion or abuse of discretion on the part of the Circuit Court of Appeals in refusing to consider the purported evidence in the transcript of record. In this case we are dealing with an absolute noncompliance with the imperative requirement of Equity Rule 75, that the evidence shall be condensed and put in narrative form. This is not a case in which a part of the evidence was condensed and put in narrative form but held by the Court of Appeals not to be in compliance with Equity Rule 75; thus presenting the question whether the Court of Appeals had abused its discretion in so holding and in refusing to accept and consider the evidence, and thereupon affirming the decree.

In this case, no effort whatever having been made to comply with the rule in the matter of condensation, the evidence could not under the rule be made a part of the record for the purposes of, or to be used on, appeal, and the Court of Appeals had the absolute power to refuse to accept or consider it. This was not a matter of discretion. It was the duty of the Court of Appeals to do what it did and its action is not reviewable.

Three outstanding requirements are indispensably necessary to make the evidence a part of the record in the District Court, and to its certification to the Court of Appeals by the clerk of the District Court, namely, first, the evidence must be put in condensed and narrative form; second, it must be thereupon approved by the District Court in the manner prescribed by the rule; and, third, upon and after being approved, it must be filed in the District Court clerk's office, and thereby made a part of the record of that court.

The condensation, the approval and the filing are all essential, and in the absence of any one of these things, the evidence, for the purposes of appeal, or for use on appeal, cannot be made a part of the record of the District Court and certified to the Court of Appeals by the clerk of the District Court, or considered by the Court of Appeals,—and it was not in the discretion of that court whether or not it should consider it.

The Circuit Court of Appeals in the case at bar correctly held that it was not within the power of the District Court or judge to approve, or to enter an order approving, such a statement of the evidence. Nor was it, we submit, in the power of the Circuit Court of Appeals to accept and consider such a statement of the evidence. For either court to do this would operate as an abrogation of the rule itself.

As the Circuit Court of Appeals of the Second Circuit, in *Hurwood* v. *U. S.* 258 Fed. 811, at 824, in speaking of the force and sanction of Equity Rules 75, 76 and 77, said:

> "There is no power in this Court to exempt a particular case from their operation. The rules having been promulgated under the authority of an Act of Congress have the authority of statutory regulations."

The enforcement of the rule is therefore not reviewable.

The case at bar must therefore be distinguished from the case of the *Lakewood Engineering Company* v. *A. W. French & Company, et al.* No. 200, of the October, 1927, term of this court, and set for oral argument on October 3rd, and also from the case of *Fairbanks, Morse & Co. et al.* v. *American Valve & Meter Co. et al.* No. 262, pending in this court at the October, 1927, term.

In both of these cases, it appears that the evidence was, at least to some extent, condensed and put in narrative form, and therefore they present the question whether or not it was a statement of the evidence in compliance with the rule, and particularly the provision of the rule that "if either party desires it, and the Court or Judge so directs, any part of the testimony shall be reproduced in the exact words of the witness."

It may be, therefore, that these cases present a matter of discretion or abuse of discretion by the Circuit Court of Appeals. It is not so in the case at bar, however.

Furthermore, as we pointed out in our Supplemental Statement of the Case, the evidence thus approved by the order of the trial court or judge was not "*true*" or "*complete*," as required by Equity Rule 75.

It affirmatively appears, from an inspection of that part of the printed transcript which purports to contain the "certificate of evidence" that it is *not true* nor *complete*. For example, in Volume 4, page 1517, there is purported to be set forth Defendant's Exhibit 16; the page, however, does not contain the exhibit, but is blank.

Volume 4, page 1519, purports to set out Defendant's Exhibit 17, but again it is left blank.

Volume 4, page 1563, purports to set forth Defend-

ant's Exhibit "Pennyman Chart," but the page is left blank.

Volume 9, pages 4732, 4733, 4734, 4735, 4736 and 4737 contain memoranda which do not purport or appear to be exhibits introduced in evidence. They are entitled "Choctaw Memorandum," "Memorandum Tank Steamers," "Losses of the Trinidad Lake Petroleum Co. From the Abandonment of Wells," "The Uintah Railway Company," "Inter-Office Correspondence" and "Relationship of B. A. P. and Affiliated Companies, Whose Products are Involved in Patent Action, Standard vs. Barber."

On pages 4776 and 4777 there appears what purports to be Defendant's Exhibit D, which purports to be a statement of the income and costs for accounts considered in manufacturing profits shown on Exhibit C. *The transcript in question nowhere shows that this Exhibit D was ever introduced in evidence.*

As we pointed out in our Supplemental Statement of the Case, the transcript of the record, or so-called "certificate of evidence," shows on its face that out of a total of 196 exhibits introduced and received in evidence by both petitioner and respondent, on both the trial of the infringement and on the accounting issues, 114 are omitted from the alleged certificate of evidence. A detailed statement of the exhibits included and omitted will be found on pages 189 to 196 of the record.

Still again, as we further pointed out in our Supplemental Statement of the Case, the affidavit of Mr. Paul (Rec., 111-115), one of the solicitors for petitioner in the District Court, in the Circuit Court of Appeals and in this court, states expressly and further shows, that in the preparation of this so-called "certificate of evidence" there was an "*immense amount of elimination and con-*

densation," all, however, without the knowledge, concurrence or participation of the District Court or appellee (respondent here. Yet, notwithstanding all this, the District Court, atthe request of petitioner, stated in its order of March 3, 1926, that the so-called certificate of evidence was "true" and "complete."

It will be noted that the order of the District Court in question does not say that the evidence in the transcript of the record is *all* of the evidence offered or received on the trial of the cause. It simply says that it is "approved as a true, complete and properly prepared statement of the evidence (including the testimony and exhibits therein referred to, and the stipulations of the parties)." This is not tantamount to saying it is *all* the evidence offered and received, but if it were, as we have pointed out, the purported transcript of evidence shows on its face that this is not the fact.

The evidence in the transcript being admittedly in incomplete, garbled and emasculated form, the Court of Appeals could not consider the evidence in the uncondensed form in which it appeared, nor could it permit it to be put in condensed and narrative form because of its incompleteness.

It is manifest that in the case at bar, it is not a mere matter of putting "*complete*" evidence in narrative form, but a matter of starting all over again, in an attempted compliance with Equity Rule 75.

Manifestly, it was not only too late, as a matter of general principle, and within the recognized policy of the law, to permit this to be done *at the late date*, petitioner asked leave to do this, namely, after the order of affirmance had been entered, but, as we point out in our Points II, page 74, III, page 75, IV, page 78, VI, pages 82 to 94 inclusive, there were other conclusive reasons why the

Circuit Court of Appeals of right and of necessity refused both to consider the purported evidence or to permit petitioner to put it in the form or to do the other things required by Rule 75.

Counsel for petitioner are in error in their contention that Equity Rule 76, providing "If in the transcript anything material to either party be omitted by accident or error, the Appellate Court, on proper suggestion, or its own motion, may direct that such omission be corrected by a supplemental transcript" was intended to provide for such a situation as the Circuit Court of Appeals considered and had before it in the case at bar, and it should have directed correction of the error by supplemental transcript, instead of disregarding the alleged certificate of evidence, and affirming the judgment, because, as it held, the evidence was not properly before it.

In the first place, Equity Rule 76 does not imperatively require the Circuit Court of Appeals to do this in any case, but simply says it *may* direct it to be done, and clearly, therefore, it is within the sound discretion of the court to do it or not as the case may be.

The provision of Equity Rule 76 is that the Appellate Court "may" direct a supplemental transcript of anything material to either party *"omitted by accident or error."* The failure to properly prepare the certificate of evidence, and obtain its approval, certification and filing, in order to make it a part of the record of the District Court, as required by Equity Rule 75, was not "an accident or error" on the part of petitioner's solicitors, but was a matter of deliberate purpose and intent. Even if Equity Rule 76 were applicable thereto, which we say it is not, the Court of Appeals under the circumstances in the case at bar, was fully warranted in

its discretion to refuse to send back the transcript of the record and the purported certificate of evidence therein, as suggested by counsel for petitioner.

In the second place, however, and conclusively, we submit, Equity Rule 76 simply provides for supplying a deficiency either on motion of the parties, or on the court's own motion, where a diminution of the record is suggested or is apparent. This rule simply authorizes a supplemental transcript of record. It does not authorize the Court of Appeals to direct that something that has not been made a part of the record in the District Court shall be brought up by supplemental transcript. In other words, the Court of Appeals has no authority to direct or order any addition or supplement to the record in the District Court, or the making of something a matter of record in that court that has not been properly made so, and then require the same to be certified up by the clerk by supplemental transcript.

This would be changing the record.

Equity Rule 76 is merely a recognition of a power inherent in every court of review, namely, to direct, either on suggestion or its own motion, the clerk of the lower court to send up by transcript additional parts of the record necessary or appropriate to the review and determination of the cause.

The general rule is thus stated in 4 C. J. 507:

> "The authority to issue a certiorari, or to make similar orders directing a return of a full and complete transcript, is vested in the Appellate Court, and may be exercised in its discretion in all proper cases."

But it is also said (4 C. J. 509):

> "*Certiorari will not be issued to bring up matters not of record or not considered in the Court below.* * * * So allegations of diminution are

not allowable for matters of evidence *where the evidence sought to be brought up is omitted from the bill of exceptions or abstract.*"

PETITIONER'S POINT III.

It is argued under this point that the affirmance of the decree of the court below by the Circuit Court of Appeals was in violation of Section 269 of the Judicial Code as amended, requiring the Circuit Court of Appeals to give judgment after an examination of the entire record without regard to technical errors, defects or exceptions which do not affect the substantial rights of the parties.

Counsel for petitioner are in error in saying that the total failure of petitioner to comply with Equity Rule 75 was a mere technical defect and did not affect "the substantial rights " of appellee (respondent here). The rule contemplates that the evidence prepared by appellant should be submitted to appellee for examination and correction, if necessary. It provides for a judicial hearing in which counsel for appellee may participate with the aid and under the supervision of the trial court in the preparation of a "true, complete and properly prepared" statement of the evidence. Appellee was denied its day in court and this resulted in the filing of an untrue, incomplete and emasculated transcript of the purported evidence and testimony, prepared solely by counsel for appellant and without either the examination and approval of the court or the participation of counsel for appellee.

That this is a valuable and substantial right of which appellee cannot be deprived, has been fully recognized by the Supreme Court and other federal courts.

Manifestly, the Circuit Court of Appeals could not

consider this untrue and incomplete presentation of the evidence and give judgment thereon. Manifestly, also, it had the absolute right to refuse to consider the evidence submitted in its uncondensed form.

Section 269 of the Judicial Code as amended does not and was not intended to apply to a situation such as this. If the section were to be applied as contended for by counsel for petitioner in this case it would to all intents and purposes completely abrogate the rules of court, *nisi prius* and appellate, and all statutory provisions regulating practice and procedure. Of necessity, it cannot and was not intended to be given such a construction and application. Equity Rule 75 was promulgated by the Supreme Court pursuant to the express statutory authority and direction and, as was directly stated in *Buessell* v. *United States*, 258 Fed. (C. C. A. 2nd Cir.) 811, has "the authority of statutory regulation" of equal sanction with Section 269 of the Judicial Code. Properly applied they are not inconsistent but are, on the contrary, in entire harmony. No court, we submit, has ever suggested any such contention as is now urged by counsel for petitioner. On the contrary, the Supreme Court in *Newton* v. *Consolidated Gas Co.*, 258 U. S. 165, and in *Houston* v. *Southwestern Tel. Co.*, 259 U. S. 318, 325, as well as other federal courts, have clearly indicated that a violation of Equity Rule 75 may properly be visited with a dismissal of the appeal or an affirmance and in the Houston case this court refused to consider such evidence, which amounted to an affirmance so far as such evidence was concerned. Even Judge Alschuler, to whom counsel for petitioner so frequently refer, in his dissenting opinion in *R. W. Clark Mfg. Co.* v. *Tablet & Ticket Co.*, attached to petitioner's brief, said that he did not contend that the Court of Appeals was without power "in a proper case

to impose dismissal or affirmance as a consequence of the infraction" of Equity Rule 75 but simply indicated that under the peculiar and wholly different circumstances of that case he believed that an opportunity should have been given to put the evidence in proper form.

All of the foregoing suggestions are quite aside from the conclusive fact that the Court of Appeals could not consider and give judgment upon the purported evidence because it was never filed in the office of the clerk of the District Court and therefore never became a part of the record of that court or properly a part of the transcript of the record filed in the Court of Appeals.

PETITIONER'S POINT IV.

It is contended under this point that *the belated* order of the District Court of March 30, 1926, *entered upon request of appellant (petitioner here)* and ordering that "all the testimony in this cause be reproduced *in the exact words of the witnesses and not in narrative form*" was at most reversible and not an irremediable error, and that the Circuit Court of Appeals should therefore have granted petitioner's motion for leave to procure from the District Court a record complying with its orders or requirements.

What we have already said applies in large part to the point in question.

The utter and flagrant violation of Equity Rule 75 by counsel for petitioner is not a matter of mistake or error in any proper sense of the word. It is a matter of deliberate flaunting of a rule of court, with statutory sanction, that may be properly visited, as this court and other federal courts have said, by a dismissal or an affirmance.

Counsel say that "when the District Court or Judge has certified a statement of evidence as true, complete and properly prepared" and such statement has been filed "*in the clerk's office as prescribed,*" the Circuit Court of Appeals cannot take the position *that no evidence is before it.*

In the first place, the Court of Appeals did not say that "no evidence" was before it. It said in the concluding paragraph of its opinion that because the evidence was "not *properly before*" it refused to consider it and affirmed the decree.

Furthermore, counsel for petitioner are in error in the quotation from their brief in saying that the evidence had "been filed in the Clerk's office as prescribed" by Equity Rule 75. Equity Rule 75 requires the statement of the evidence to be filed in the *District Court* clerk's office, in order to make it a part of the record of the *District Court* for the purposes of the appeal. The purported statement of the evidence in the transcript filed in the Circuit Court of Appeals clerk's office was *never* filed in the District Court clerk's office and never became a part of the record of that court and therefore could never be included in a transcript of the record of that court. For this added reason the Circuit Court of Appeals not only correctly found that no evidence was "properly" before it but could have specifically found, contrary to the contention of counsel, that *no evidence whatever* was before it.

Counsel say that "in no case so circumstanced has this court, or any Circuit Court of Appeals, ever disregarded the record before it, either in whole or in part."

In this counsel are in error.

In *Newton* v. *Consolidated Gas. Co.*, 258 U. S. 165, the court said it would feel at liberty to punish the violation

of the "plain duty" imposed by Equity Rule 75 to the limit of its discretion—"possibly by dismissal of the appeal," and in *Houston* v. *Southwestern Tel. Co.*, 259 U. S. 318, 325, it did what was tantamount to an affirmance, namely, declined to consider the assignment of error predicated upon the evidence in the cause.

And in *Buessell* v. *U. S.*, 258 Fed. 811, the Circuit Court of Appeals of the Second Circuit refused to consider the testimony because it was not in the transcript in conformity to Equity Rule 75.

So in *Roxana Petroleum Co.* v. *Rush*, 295 Fed. (C. C. A. 5th Cir.) 844, 846, the court refused to consider the evidence because of noncompliance with Equity Rule 75.

In both instances, this was equivalent to affirmance.

In *Patterson* v. *Mobile Gas Co.*, 271 U. S. 131, 132, Mr. Justice McReynolds said:

> "The record in this cause has been made up with such disregard of the rules that *we cannot undertake to examine the evidence* or to discuss seriatim the thirty four jumbled assignments of error. *It would be permissible to dismiss the appeal* (*Newton* v. *Consolidated Gas Company*, 255 U. S. 165, 174);"

Not only in the above cases and the cases cited by the court in its opinion, but in numerous cases decided by state courts of last resort, appeals have been dismissed and decrees and judgments of the lower courts affirmed and a review of assignments of error based on evidence refused, because of violation of the rules of the reviewing courts *requiring evidence to be condensed and printed in narrative form*, similar to Equity Rule 75.

Indiana D. & W. Railway Co. v. *Ditto*, 158 Ind. 669; 64 N. E. 222 (1902).

Cleveland C. C. & St. L. Ry. Co. v. *Snow*, 37 Ind. App. 646; 74 N. E. 908.

Caswell v. *Hopson*, 43 S. W. Rep. 547; (Ct. of Civ. App. Texas, 1897).

O'Keefe v. *Beecher*, 17 N. Dak. 404; 117 N. W. 353.

Smith v. *Kunert*, 17 N. Dak. 120; 115 N. W. 76.

Morgan v. *Chittenden Land Co.*, 92 Wash. 364; 159 Pac. 129.

Many other similar or analogous cases are cited in the Appendix.

Under this point it is argued also that the only penalty that may be imposed for the violation of Equity Rule 75 is the imposition of costs.

Whether Equity Rule 76 providing for the imposition of costs for its infraction, applies also to the violation of Equity Rule 75 is debatable and by no means free from doubt. But even assuming that it does so apply, it by no means follows that it is the exclusive or the only permissible action of the Court of Appeals. Neither the Supreme Court nor any Court of Appeals has ever so held. On the contrary, as we have pointed out, the penalty of dismissal or affirmance may be visited in the exercise of the inherent power of the court to protect itself from such imposition. Even the case of *In re General Equity Rule* 75, 222 Fed. (C. C. A. 6th Cir.) 884, 886, cited and relied upon by counsel for petitioner, it was said that "*this drastic remedy may prove to be necessary in some cases*" and Judge Alschuler, whose dissenting opinion is also relied upon, recognized "*affirmance or dismissal as a permissible consequence of noncompliance with Equity Rule* 75."

While recognizing that this court, in *Newton* v. *Consolidated Gas Co.* said it might dismiss an appeal for infraction of Equity Rules 75 and 76, counsel say "no de-

cision has been found where it has even intimated that such destructive power can be exercised by the lower courts."

In the first place, this power, as we have said, is inherent in an Appellate Court and necessary to its protection, whether the Supreme Court or a Circuit Court of Appeals. In the second place, counsel overlook the fact that in the case of *Houston* v. *Southwestern Tel. Co.*, this court, and in the cases of *Buessell* v. *U. S.* the Circuit Court of Appeals of the Second Circuit, and in *Roxana Petroleum Co.* v. *Rush* the Circuit Court of Appeals of the Fifth Circuit, refused to consider the evidence and assignments of error predicated thereon, which, of course, operated as an affirmance so far as the evidence and the assignments of error in question were concerned.

Furthermore petitioner's contention that the right and power of the Circuit Court of Appeals to decide a cause before it, is controlled by Equity Rule 76 and that it has no power to affirm a judgment where there is no evidence for it to pass upon but can only award costs, is, of course, flatly contradictory to the contention of petitioner's counsel that Equity Rule 75 is an attempted invasion of the jurisdiction of the Court of Appeals.

How petitioner's counsel can reconcile an argument putting a construction upon Equity Rule 76 which makes it controlling of the decison and judgment of the Circuit Court of Appeals when the burden of its argument is that Equity Rule 75 is invalid as an unwarranted invasion of the jurisdiction of that court, we cannot understand.

Equity Rule 75 does not attempt in any manner to control the action of the Court of Appeals. Equity Rule 76, if given the construction sought to be placed upon it by petitioner's counsel, would absolutely control the deci-

sion of the Circuit Court of Appeals and deprive it of power to decide according to its judgment.

The further suggestion of petitioner's counsel in their brief (p. 18) that while this court has suggested that it might dismiss an appeal for infraction of Rule 75 no "such destructive power can be exercised by the lower courts," presents an anomalous view. If it is proper for this court to dismiss an appeal for infraction of Rule 75, why should the Circuit Court of Appeals in a case in which it has jurisdiction be required to follow a different course and thus be deprived of the right to adopt the precedent of this court? The argument carries its own answer. The power to so decide is no more "destructive" when exercised by the Circuit Court of Appeals than when exercised by this court, and the intimation that there is some kind of limitation upon the power of the Circuit Court of Appeals to dispose of a case in that way is not even attempted to be justfied either by reason or precedent.

On the contrary, the decision of this court in a case on direct appeal from the District Court seems to furnish the best possible precedent for similar action by the Circuit Court of Appeals in a case within its jurisdiction.

Neither should it be overlooked that the construction placed by petitioner's counsel on Rule 76 ignores the language of that rule, which is clearly not mandatory but permissive, the controlling word being "may."

It is also noteworthy that while petitioner's counsel, throughout their brief, build largely on the dissenting opinion of Alschuler, Circuit Judge, in *Clark Manufacturing Co.* v. *Tablet & Ticket Co.*, they are forced into the position of contending that his views in reference to the present case are erroneous.

PETITIONER'S POINT V.

Counsel say under this point that the Court of Appeals should at least have passed upon the issue of plaintiff's title, as to which the evidence was wholly documentary and incapable of being reduced to narrative form.

Counsel say, "all the evidence upon this issue was in the record and entirely in documentary form." We have nothing but the word of counsel for this. The District Court has not so certified nor does it appear from the transcript of the record and the purported evidence therein. The same is true of the statement of counsel that "no oral testimony was offered upon this issue," and that therefore the requirement of Equity Rule 75 for the condensation of the evidence and the statement of the testimony of witnesses in narrative form did not apply. Certainly the untrue and incomplete and improperly prepared statement of the evidence in the transcript of record on file cannot be used, relied upon or resorted to to sustain any such gratuitous statements of counsel.

As a matter of fact there was oral evidence introduced that had a very material bearing upon the question of title and the right of appellant (defendant below), or anyone else to challenge or question the title of appellee (plaintiff below).

In view of the fact that the solicitors for petitioner who prepared the transcript of the record instructed the clerk of the District Court, by praecipe for record to include only certain documents as exhibits, and admittedly "eliminated" a large part of the exhibits from the record, without consulting either the District Court or coun-

sel for appellee, the Court of Appeals could not properly, even if it desired to do so, pass upon any question of fact in the record. *Out of* 196 *exhibits which were offered in evidence, as appears by the record,* 114 *exhibits, or over one-half, have been "eliminated."* We ask, is this the kind of a record upon which any court of review can base a decision on the question of title to the letters patent involved if the title be in dispute? Manifestly not, it would be an unheard of practice for any court of review to decide any issue of fact upon a record which is admittedly incomplete and which has been emasculated by a solicitor of one of the parties by a process of elimination and inclusion of matter appearing not to have been put in evidence, without the consent of the other party or any supervision by the trial court. If any court should undertake to do so it is hardly necessary to point out what the consequences of such a procedure would be and to what it would open the door in other cases.

The answer is so self-evident that it hardly needs any illumination. The solicitor who prepared the transcript of record and assumed to delete evidence and exhibits which had been offered and admitted in evidence in the District Court, should have applied to the District Court under Rule 75, upon notice to the other party with the opportunity to be heard, to approve his act, and not expect the Court of Appeals to search through 9 volumes of nearly 5,000 pages in order to decide or pass upon the question whether or not the evidence and exhibits he deleted and eliminated from the transcript of record are or are not irrelevant or incompetent upon the question of title or any other issue in the cause.

The suggestion of counsel for petitioner that the Court of Appeals should have passed upon a single

isolated question of fact upon fragmentary documentary evidence and upon an untrue, incomplete and improperly prepared statement of the evidence is, we submit, ill conceived and lacks the merit of precedence or common sense.

Furthermore, as we have pointed out, the purported evidence in the transcript of record is not only untrue, incomplete and improperly prepared, but was never approved and, upon approval, properly certified to and signed by the District Court or Judge and *thereupon filed in the office of the clerk of the District Court* and thereby made a part of the record of that court, and consequently was never properly incorporated by the clerk of the District Court in the transcript of the record in this cause. For this added reason, the Circuit Court of Appeals could not consider the alleged evidence on the question of title because, quite aside from the statement of evidence in condensed and narrative form, the evidence, whatever it may have been, was never before the Court of Appeals at all.

PETITIONER'S POINT VI.

And finally, counsel for petitioner urge that regardless of all of their antecedent contentions, the Circuit Court of Appeals, in view of all of the surrounding circumstances, failed in this case to exercise a sound discretion in refusing to afford petitioner the opportunity to comply with Equity Rule 75.

We contend, on the contrary, that not only did the Circuit Court of Appeals not abuse its discretion but that under the circumstances it could not have granted the belated request of counsel for petitioner, who for more than a year stood in defiance of the plain, affirmative and

imperative language of Equity Rule 75, after full notice and admonition and in the face of respondent's objections and motion to dismiss, based upon this violation and noncompliance with the rule, without doing grave injustice and injury to respondent.

The chronology of events referred to in the opinion of the Circuit Court of Appeals (Rec., 68), and set forth in respondent's supplemental statement of the case (*ante*, pages 2-3) shows conclusively, we submit, the long delay to which respondent was subjected by petitioner in the perfecting of its appeal, and the submission of the cause to the Circuit Court of Appeals. This delay, and the further great delay and added cost and expense to which respondent would have been subjected, if the request of petitioner to begin all over again in an effort to comply with Equity Rule 75 had been granted, quite aside from other essential and controlling considerations, manifestly had its influence with the Circuit Court of Appeals.

We charge that this chronology shows deliberate and intentional delay. Although the printed transcript of the record was filed July 3, 1925, appellant withheld filing in the Circuit Court of Appeals clerk's office,—as it was its duty to do under the rules of that court—twenty-five copies of this same printed record (which, of necessity, petitioner had in its possession during this time) until November 21, about four months later. Immediately upon being served by the clerk with a copy of this printed record, respondent proceeded to prepare its motion to dismiss, and its objections, based upon the violation and utter failure to comply with Equity Rule 75, and filed the same on November 9, or seven days after being served. The motion came before the Court of Appeals on November 9, and was taken and reserved to the final determination of the cause.

After petitioner was thus admonished on November 9, 1925, it waited two months before it again proceeded, and on January 4, 1926, made its motion to remit the transcript of the record to the District Court for the purpose of obtaining from it a certification of the evidence and testimony of witnesses. Counsel were permitted to file briefs, and the argument of the motion was set for January 29, 1926.

That the violation of Equity Rule 75 was strongly and insistently urged by respondent, and sought to be avoided or justified by petitioner, is conclusively shown from the excerpts of their respective briefs (Rec., 129-132), set out in respondent's supplemental statement of the case. (*Ante*, pages 10-13.)

In the face of respondent's motion to dismiss and objections, and insistence that Equity Rule 75 be complied with, respondent uncompromisingly stood out against such compliance.

On January 29, 1926, the Court of Appeals entered an order on appellant's motion for leave to transmit the printed transcript of the record to the District Court for further certification, but expressly provided in the order, at the end, "It is further ordered that the effect and validity of such certificate, if obtained, should be reserved for the final determination of this cause."

Thus, petitioner, being fully admonished by this reservation of the Court of Appeals, as well as the motion and objections and brief and argument of respondent, nevertheless waited two months, namely, until March 30, 1926, before going to the District Court under the order of January 29, 1926.

Even then, and in the face of these admonitions, petitioner did not attempt to comply with Equity Rule 75 by condensing the evidence, and putting the testimony

of witnesses in narrative form, but contented itself with obtaining from the court the entry of the order of March 30, 1926, and the filing of a certified copy of this order in the Circuit Court of Appeals. It did not get the District Court or Judge to attach or append his certificate and signature to that part of the transcript of the record purporting to contain the evidence and testimony of witnesses in uncondensed form, *nor did it even file* the same in the office of the clerk of the District Court so as to make it part of the record of the District Court, as the Equity Rules specifically require. Petitioner simply took back and redeposited the original nine volumes of transcript of record in the office of the clerk of the Circuit Court of Appeals, with an additional small printed volume, No. X, containing a certified copy of the order of March 30, 1926.

On October 6, 1926, when the cause came on for oral argument, counsel for respondent called attention to its pending motion and objections, and filed additional reasons for the dismissal of the appeal (Rec., 65), among which were that the order of Judge FitzHenry, entered on March 30, 1926, as set forth in the supplemental transcript of record filed April 13, 1926, page 4913, and in the Supreme Court Record, p. 48, was entered without jurisdiction, and was void, and did not amount to or constitute a certification of the alleged evidence, and that said alleged evidence had never been certified to by the District Court, and had never been made a part of the record in the cause, and also that it appeared from the purported transcript of the record that neither the purported testimony taken on the infringement issue, or on the accounting, was complete in that it appeared that out of a total of 196 exhibits received in evidence on the trial of the above issues, 114

thereof were wholly omitted from the purported transcript of the record.

The whole matter of petitioner's violations of Equity Rule 75 were thus submitted to the Circuit Court of Appeals by petitioner with full knowledge on its part of such violations, and without having made any attempt to rectify them. On the contrary, it sought to evade the rule by having the District Judge do that which the rule expressly forbids, namely, direct that "all the testimony be reproduced in the exact words of the witnesses." Petitioner evidently did not choose to go to the trouble or the expense of submitting to the delay necessary to comply with the rule, but elected to take its chances. It gambled that it could circumvent the rule. It lost. It was not until after the Circuit Court of Appeals had held that it would not consider the evidence in the condition in which it was presented, *more than a year after petitioner's attention was called by respondent to the infringement of the rule*, and *to respondent's position in respect thereto*, that petitioner asked the Court of Appeals for permission to make an effort for the first time to comply with the rule.

We submit it was then, and is now, too late for petitioner, after it had submitted these matters to the determination of the court, and after they had been decided adversely to petitioner, to come in and ask the court to set aside its action, and to permit petitioner to start all over again. To allow this would be to run counter to the whole policy of the law and the courts.

The remarks of Mr. Justice Nelson in *United States v. Adams*, 9 Wall. 554, are strikingly applicable to this phase of the case. He said (p. 559):

> "The remedy, in case the Court of Claims falls into a mistake as to the finding of the facts, is familiar. It is by an application to this court to re-

mit the case back for correction, if it be shown, satisfactorily, that a mistake has been committed.

In the case before us, it is admitted that the mistake was known to the party and his counsel in season to have had it corrected before hearing; but, relying on its immateriality, no step was taken to have the correction made. We do not doubt but that this opinion was honestly entertained, and that this motion is made in good faith; but it is impossible not to see that, if granted, the precedent might lead to great abuse and delay in the hearing of these cases. We should allow either party to lie by till the cause was decided, and the opinion delivered, and then to apply for the correction, as the exigency of the case might require, or as the materiality of the fact might appear from the ground upon which the decision was placed. On an appeal, the parties were entitled to have all the facts proved in the case before the court below, in the judgment of the court, truly found, and stated in the record, that either deemed material to the decision; and, as we have seen, the remedy is ample to correct any mistakes committed, if applied for prior to the hearing in this court. The Court are not willing to go farther, and permit the remedy to be applied after the case is heard and decided, as we fear that such a precedent would work greater injustice and hardship, in its general use and application, than that which may exist in any particular case."

As was said in *Blusse* v. *United States*, 263 Fed. (C. C. A. 2nd Cir.) 961:

"We are not insensible to the fact that the dismissal of a cause without passing on the merits, because the inadvertence of counsel has disregarded an established rule of procedure, is to impose upon the litigant an extreme penalty. At the same time we are compelled to adhere to established rules of orderly procedure, which experience has shown to be important in the administration of justice. The rules respecting the preparation of a case to be brought to an Appellate Court on writ of error are not uncertain and are not obscure, and it is to be assumed that they are familiar to counsel. A fail-

gates, at the present time, approximately $870,000. But, be that as it may, we have yet to learn that the application and enforcement of the law and the rules of court are to be governed or influenced by the amount of money involved.

In support of their contention under Point VI, counsel say that the Circuit Court of Appeals, without warning, reversed its practice of many years standing, which petitioner followed in good faith and on the best advice it could obtain.

We submit this is entirely aside from the question. Whatever the practice may have been, respondent, as we have shown, was vigilant in asserting its rights and invoking the protection of the rule as both Judges Page and Alschuler said.

Respondent's insistence was not merely technical, or merely that the evidence was not put in proper form. Its objections were substantial, and that it had been deprived of a real, valuable and undeniable right, namely, the right under the rule to have the District Court pass upon the evidence to be used on the appeal, to the end that as the rule expressly says, the certificate of evidence be "true, correct and properly prepared", as a condition precedent, which, being approved by it, and thereupon being filed and made a part of the record of the District Court for the purposes of the appeal, and the right also to participate and be heard by the court to the same end, of all of which respondent claimed it had been deprived by the improper and *ex parte* actions of petitioner, and in consequence of which, the purported transcript of the evidence submitted to the Court of Appeals was not true or complete, but as it showed on its face, and as the petition for rehearing and the affidavit of petitioner's solicitor admit, is incomplete, deleted and

emasculated, and contains matter never put in evidence at all.

Whatever the practice of the Court of Appeals may have been, we submit that respondent was entitled to the enforcement of the rule in its protection.

This court said, in the case of *Newton* v. *Consolidated Gas Co.* 258 U. S. 165, that "These Rules (Equity Rules 75 and 76) were intended to protect the courts against useless and burdensome records, *and litigants from unnecessary costs and delay.* Counsel ought to comply with them, and the trial court should enforce performance of this plain duty."

Respondent was entitled to the enforcement of this plain duty, and to protection from unnecessary further costs and delay.

The Court of Appeals recognized the rights of respondent in this respect, *and Judge Alschuler specifically differentiated the case at bar from the case of R. W. Clark Mfg. Co. vs. Tablet & Ticket Company, in his dissenting opinion, by pointing out that in the case at bar "the appellee insistently moved and urged dismissal of the appeal because of noncompliance with the rule," thus indicating that he would not have dissented from the action of the court in the case at bar.*

Whatever the action of the Circuit Court of Appeals may have been in other cases, *we assume that verity* will be attached to the statement of Judge Evans in the prevailing opinion in the case of R. W. Clark Mfg. Co. vs. Tablet & Ticket Company, that "for fourteen years the courts have appealed to the Bar to comply with the rule" and that "they have scolded and they have threatened", but, regardless of this, respondent was insisting upon its rights, and the enforcement of the plain, unmistakable and imperative requirements of the rule

in its protection, as stated by this court in *Newton* v. *Consolidated Gas Company, supra.*

Counsel for petitioner call attention to a number of other cases in which the appellants were given leave to conform to Equity Rule 75, saying "In petitioner's case alone has such opportunity been denied."

The reason for this action of the Court of Appeals is patently manifest.

In the other cases referred to, the uncondensed testimony in the form of questions and answers, and without being put in narrative form, was incorporated in the transcript of the record filed in the Court of Appeals *by stipulation of the parties,* and in certain instances, in addition, *with the affirmative approval* of the trial court. It is thus manifest that both parties participated in those cases in the violating of the rule of court, and, particularly, Rule 75, and that, therefore, the appellees were in no position to ask for the enforcement of the rule, and did not do so.

Under those circumstances, none of the appellees in the other cases was in a position to complain or oppose the action of the court in permitting the testimony to be put in narrative form because of the delay that might be involved, or the expense involved, or for any other reason.

This, however, was not the situation in the case at bar. Respondent in this case is in a position to rightfully and equitably ask the protection of the court against the unnecessary cost and delay, not only involved in the violation of the rule in the first instance, but particularly in the delay and expense involved at this late date in granting relief to petitioner to now put the evidence in "simple and condensed" and in "narrative" form.

Respondent in the case at bar did not stipulate and thereby preclude itself, as did the appellees in the other cases, but, on the contrary was from the beginning earnest and vigilant in claiming the protection of the court under Equity Rule 75, and in insisting upon the performance by appellant of its plain duty, to use the words of this court in the Newton case, and thereby relieving appellee, to use the language of the Court of Appeals in the *R. W. Clark Mfg. Co.* case, of the unnecessary expense and unnecessary delay which unavoidably follows an attempt to dispose of litigation in such an awkward and cumbersome manner.

Under the title "The History of this Particular Record", (page 24), counsel for petitioner make many astonishing statements.

Thus it is said that the record establishes that petitioner's counsel, far from having any disposition to violate the rules, have taken throughout the utmost pains to present their record in the form which they believed would be most acceptable to the Circuit Court of Appeals.

To evidence this, it is said that Mr. Paul, one of petitioner's counsel, relied upon the advice of his senior local counsel, the late Mr. Edward Rector, of Chicago, and thereupon proceeded to ignore utterly the clear and imperative mandates of Equity Rule 75 in every particular.

Equity Rule 75 is as plain and unambiguous as language can make it. There is no mistaking its meaning or its imperative character. It is not merely affirmative and directive in form, but on the contrary is first negative and then affirmative in form, the language being,

> "the evidence to be included in the record *shall not* be set forth in full but shall be stated in simple and condensed form * * * and the testimony of witnesses being stated *only* in narrative form."

That counsel for petitioner understood that the failure to condense and put in narrative form and to otherwise comply with the essential requirements of Equity Rule 75 was involved and included in the motions and objections of respondent, is conclusively shown by the excerpts from the briefs of petitioner and respondent set forth in respondent's supplemental statement of the case. (*Ante*, pages 10-13.)

Counsel refer (p. 24) in their brief to the praecipe filed with the clerk of the District Court and served upon the attorneys for appellee "*directing the certification of the entire oral testimony in question and answer form.*"

THE PRAECIPE DID NOT CALL FOR ANY SUCH THING, AS APPEARS UPON ITS VERY FACE. (Rec., 42.)

As the opinion of the Circuit Court of Appeals (Rec., 69) shows and as we pointed out in our supplemental statement of the case (p. 5) the praecipe merely referred to "certificate of evidence consisting of printed pages 24 to 1215 inclusive; pages 1222 to 4591 inclusive, and the following exhibits:" and certain but only a very small part of the exhibits.

As we have pointed out in our supplemental statement of the case, there was no certificate of evidence on file or of record in the office of the clerk of the District Court to which the praecipe referred.

Counsel say (p. 25) "no objection was ever made by appellee to this praecipe nor did it ever file or serve any other praecipe."

Counsel for appellee were not required to do anything of the kind. The reference in the praecipe to the alleged certificate of evidence was utterly meaningless since there never was any certificate of evidence and, of course, the praecipe asking the clerk to include something in a transcript of record that was never filed or made a part

of the record was an utter nullity, which counsel for appellee were not required to recognize, as was well pointed out by the Circuit Court of Appeals of the Seventh Circuit in *Fairbanks Morse & Co.* v. *American Valve & Meter Co.*, 18 Fed. (2nd) 716, as follows (p. 717):

> "On appeal this court, in a sense, hears the case *de novo*, but it must not be forgotten that it hears it, not as a trial, but as a reviewing, court. The case is heard here upon such parts of the record, made in the court below, as the parties deem necessary to review certain questions raised and decided there. The record in the trial court ordinarily consists of the process, pleadings, report of the master, if there be one, and the decree. The evidence is not of itself part of the record, but may be made so 'in case of appeal' only in accordance with clause (b) of equity rule 75. When the evidence has been so made a part of the record in the court below, clause (a) of the rule provides how it may 'be incorporated into the transcript on such appeal'. Except as provided in equity rule 77, litigants have no power to stipulate what the record here shall contain."

Counsel for petitioner "put the cart before the horse." Under Equity Rule 75 a praecipe could not issue and become operative under Section (a) of that rule until after Section (b) of the rule had been complied with and a statement or certificate of evidence and testimony of witnesses had been *approved* by the District Court or Judge and *filed* in the District Court clerk's office *and thereby made a part of the record* of the cause in that court.

Counsel further say (p. 25) that appellee's motion to strike the evidence from the transcript of the record made no point respecting the condensation of the record. This is wholly erroneous. The third ground of this motion is as follows (Rec., 54):

> "3. The purported transcript of the record filed in said cause shows that the purported evidence and testimony purporting to have been taken on the

trial of said cause before the District Court was not approved by the Court or Judge before whom said cause was tried and was not signed, certified to or authenticated by said Court or Judge, and was never filed with such approval, certification or authentication in the office of the Clerk of said District Court, and never became a part of the record in said cause for the purposes of the appeal herein; *all as required by Rule* 75 of the Rules of Courts of Equity of the United States, and because and in consequence thereof, said purported proceedings, evidence and testimony should be stricken from the said purported transcript of record and disregarded and not considered by this Court, and because and in consequence thereof also the decree of said District Court entered on February 20, 1917, appearing on page 1217 of said purported transcript of record, and said purported proceedings, evidence and testimony, is not subject to review by this Court."

At the same time, on November 9, 1925, there were filed and presented to the Circuit Court of Appeals certain objections of appellee to the motion of appellant to separate and divide the argument in the cause. Among the objections was the following (Rec., 56):

"4. The purported evidence appearing in the purported transcript of the record filed herein is not stated in simple and condensed form, and the purported testimony of witnesses is not stated in narrative form, but on the contrary thereof, said purported evidence and testimony is set forth in full, all contrary to Rule 75 of the Rules of Courts of Equity of the United States, and because and in consequence thereof all of said evidence and testimony should be stricken from the purported transcript of the record in this cause and disregarded by this Court."

The third ground in support of appellee's motion directly charged that the evidence taken before the District Court had never been "approved" by the Court or Judge, as required by Equity Rule 75. The approval by the court under Equity Rule 75 necessarily involved

compliance with the antecedent requirements of the rule as conditions precedent to such approval as follows:

First, stating the evidence to be included in the record "in simple and condensed" and "in narrative form," which duty rested primarily upon appellant; second, lodging "the same in the Clerk's Office for the examination of the other parties at or before the time of filing his pracipe under paragraph (a)" of the rule; third, notifying the other party or its solicitors of such lodgment; fourth, naming the time and place where appellant would ask the court or judge to approve the statement; fifth, a hearing thereon before the court or judge.

Therefore, we submit that the statement above referred to that the evidence had not been approved as required by Equity Rule 75 of necessity and unmistakably charged that none of the conditions precedent to such approval had been complied with. It is, we contend, sticking in the bark, to say that respondent should have set forth each and all of these conditions precedent.

And continuing appellee said in this ground for its motion, not only that the evidence had not been approved, as required by Equity Rule 75, but also, "was never filed with such approval" in the clerk's office, "and never became a part of the record in said cause for the purposes of the appeal herein; all as required by Equity Rule 75," etc., providing specifically, "when approved, it shall be filed in the Clerk's office and become a part of the record for the purposes of the appeal."

It could only be filed and become a part of the record, as the rule provides, after it had been approved, and it could not be approved until the antecedent requirements had been complied with, as was specifically held by the Circuit Court of Appeals for the Seventh Circuit in *Fairbanks Morse & Co.* v. *American Valve etc. Co.*, *supra*.

Ground (4), *supra*, of objection to appellant's motion to divide the argument, above set forth in full, does specifically charge that none of the evidence in the purported transcript of the record is condensed and put in narrative form, but is set forth in full, "all contrary to Equity Rule 75," and concludes by urging that all of the evidence "should be stricken from the purported transcript of the record in said cause and disregarded by this Court." Here, certainly, is a direct and specific statement of noncompliance with Equity Rule 75, and the insistence that the evidence should be stricken and disregarded. Certainly, here the protection of the rule is invoked and the Circuit Court of Appeals so regarded it.

Counsel for petitioner say (p. 25) that the Circuit Court of Appeals ordered the transcript remitted to the District Court in order that a certificate of evidence to the trial record might be obtained and "the record otherwise amended *in certain minor points*." The Court of Appeals made no such direction but granted the order, no doubt, in order to enable counsel for petitioner to comply with Equity Rule 75, in accordance with the insistent contentions of counsel for respondent in the argument and briefs filed by order of court on the matter of petitioner's motion for leave to transmit the record for certification, etc.

Counsel say also (p. 25) that "no objection whatever was made on the said hearing by appellee to the provision of the order directing reproduction of the full testimony" and that therefore counsel for "respondent must be considered as having waived whatever objection it might have had to the reproduction of the full testimony" as fully and conclusively as if it had expressly stipulated to that effect, and (p. 26) its whole attitude amply justified petitioner's belief that the

transcript of evidence was in form satisfactory to the respondent as well as to the Court."

These are indeed amazing statements, in view of the indisputable record in this case.

As we have pointed out and as the Court of Appeals and Judge Alschuler in his dissenting opinion did also, counsel for respondent were always insistent in their objection that Equity Rule 75 had been in no manner complied with and this, as we have shown, was fully argued by both counsel for petitioner and counsel for respondent in the briefs filed on the motion of counsel for petitioner to remit the record to the District Court.

On March 30, 1926, counsel for petitioner appeared in the District Court with the prepared order of March 30 and the original purported transcript of the record, in nine volumes, and asked the court merely for the order of March 30, 1926. They did not present a statement of the evidence in condensed and narrative form, but simply presented the original transcript filed in the Court of Appeals and asked for the entry of the order of March 30 in respect thereto. Counsel for respondent, under the circumstances, stood upon their unquestionable rights, and, as the order specifically recites (Rec., 48), appeared "specially, solely and only for the purpose of challenging the power and jurisdiction of the court to entertain the motion herein and to grant relief herein prayed." In other words, counsel for respondent challenged the right and power of the court to violate the provisions of Equity Rule 75, as the order presented to it by counsel for petitioner requested it to do and also the jurisdiction and power of the court, after the expiration of the term and the perfecting of the appeal, to enter such an order.

Counsel for petitioner say (p. 26) that if Judge

Alschuler had sat in the argument of the case at bar he would not have made the statement in his dissenting opinion to the effect that the case at bar is to be distinguished from the other cases by reason of appellee's insistent objection to the uncondensed record.

Judge Alschuler was of course fully familiar with the situation in the case at bar and obviously made this statement advisedly and correctly, as did the Court of Appeals itself, or he would not have made it at all.

Without answering at length the statements of counsel concerning the delays in the disposition of the case at bar, permit us to say that we submit that the record shows, as the Court of Appeals clearly pointed out, the most inexcusable delay and procrastination in the prosecution of the cause, particularly, after the entry of the final decree of April 30, 1924. (Rec., 40.) See also the chronology of events in our supplemental statement, *ante*, pages 2-3.

In the light of all the foregoing considerations, we are at a loss to understand the statement of counsel (p. 27) that

> "after the record had been filed in the Court of Appeals respondent made a purely technical objection based upon the omission of the judge's signature in the certification of the record, necessitating the remitting of the whole record to the District Court for recertification and thus delaying the argument for nearly a year."

Again, it is said (p. 27), that on October 6 the court gave no intimation that it might decline to consider the evidence on account of the manner in which it was presented. Presumably the court assumed, in view of the objections of the respondent in its briefs filed on the matter of the motion for leave to remit the record for further certification in January, 1926, and the insist-

ence therein that Equity Rule 75 be complied with, that counsel for petitioner would, upon the granting of its motion on January 29, 1926, do what Equity Rule 75 required. Presumably also the Court of Appeals did not know what had been done in this respect until the cause came on for argument on October 6. Counsel for petitioner had made their bed; and we submit that they cannot escape responsibility, as they are seeking to do, by shifting it upon the court.

Again they say that on October 6, 1926, respondent did not make any motion to dismiss the appeal because of failure of appellant to comply with Equity Rule 75, but merely moved to dismiss the suit upon five new technical grounds. (p. 27.) This, as we have shown, is contrary to the fact. Counsel specifically, and before the argument on the merits, stated that it stood upon its motion and objections theretofore filed (Rec., 52-57) and which the Court of Appeals, by its order denying petitioner's motion for separate hearings of November 9, 1925, had continued to the hearing on the merits of the cause, the order reciting (Rec., 58) "the motion of appellee to strike portions of the record be and the same is hereby continued to the hearing on the merits of this cause." At the same time, counsel for respondent filed the additional motion and the grounds therefor of October 6, 1926. (Rec., 65.) This additional motion was, by specific order of court on October 6, 1926 (Rec., 67), also taken under advisement.

And in referring to the additional motion of October 6, 1926, counsel say (p. 27) the objections therein "were chiefly to the effect that petitioner had too greatly condensed the proof." Here counsel refer to the objections in the motion of October 6, 1926, that out of a total of 196 exhibits offered by appellee and appellant, and received in evidence on the trials of the infringement and

accounting issues, 114 had been entirely omitted from the purported transcript of the record and had never been certified to or filed in the Circuit Court of Appeals. This they call "condensation" of the proofs. *Condensation, under Equity Rule 75, does not mean irresponsible, and unauthorized omission and elimination of exhibits or other evidence or testimony.*

Counsel urge that because the Circuit Court of Appeals had not previously insisted upon compliance with Equity Rule 75, therefore, its action in refusing to consider the improperly prepared evidence and emasculated record and in refusing to give counsel for petitioner a second opportunity, with additional delay and great expense to appellee, to comply with their duty under Equity Rule 75, was an abuse of discretion. We have, we submit, sufficiently answered this contention.

Reference is made to an examination which was made "immediately preceding the filing of the petition for rehearing" of the records in the Circuit Court of Appeals in other cases. We are not advised of the circumstances under which the transcripts of record were made up in those cases. It may very well be that counsel in those cases stipulated that the evidence should be reproduced in full and in narrative form, as they did in the particular cases decided by the Court of Appeals shortly after the case at bar, in which it subsequently permitted the parties to comply with Equity Rule 75. A vastly different situation is, as we have shown, present in the case at bar. Whatever the petitioner may have been advised had been the practice in the Seventh Circuit is of no materiality, because a year before the case was argued, petitioner's attention was expressly directed to the fact that the respondent would contend that the court should not consider the evidence in the transcript of the record because it was not prepared as

required by Rule 75. In the face of this objection, petitioner did not attempt to comply with Equity Rule 75 but sought to evade it. In short, it would appear, the petitioner complains that the court elected to commence the enforcement of this rule against petitioner rather than against some other appellant.

Counsel, in calling attention to the fact that in certain other cases decided immediately after the case at bar, the Circuit Court of Appeals permitted the parties to put the record in the form required by Equity Rule 75, say (p. 31) that "no reason whatever appeared for the selection of this petitioner as the solitary victim."

We have already abundantly shown that very substantial reason existed and was recognized by the Court of Appeals and even adverted to by Judge Alschuler in his dissenting opinion, in the Clark case, printed in full as an appendix to petitioner's brief as follows:

> "*While in Barber Asphalt the appellee insistently moved and urged dismissal* of the appeal *because of noncompliance* with the rule, in this case, as in most, if not all, the others the transcript was prepared *under stipulation of counsel for all parties and consent of the trial Judge.*"

This litigation had lasted over twelve years. More than ten years had elapsed since the interlocutory decree was made, and nearly three years since the final decree was entered. The petitioner had been found guilty of infringement. During all this time, respondent had been deprived of the money which the final decree adjudged it was entitled to receive. Surely, under these circumstances, the discretion of the Circuit Court of Appeals should not be exercised in favor of the petitioner, who flagrantly ignored and attempted to circumvent, over the objection of the respondent, a rule of practice which this court has considered so important as to justify it in refusing to consider evidence and as-

signments of error based thereon not made up in accordance therewith.

Notwithstanding the contentions of counsel, the action of the Court of Appeals in refusing to consider the evidence and in affirming the decree, and in denying petitioner's application for further indulgence and delay, was the usual and proper course of procedure in all courts under similar circumstances. We have already shown that this court, and other federal courts, have refused to consider evidence brought before them in violation of Equity Rule 75, which is, of course, tantamount to affirmance, so far as the evidence and assignments of errors based thereon are concerned.

In the federal and state courts, the refusal to consider evidence after affirmance or dismissal of an appeal for failure to observe rules similar to Equity 75, or other rules of appellate procedure and practice, is usual and general.

We attach as an Appendix "A" a list of such cases.

POINTS PRESENTED AND URGED BY RESPONDENT.

In addition to the contentions urged by respondent in support of the action of the Circuit Court of Appeals and in opposition to the points made by petitioner, respondent urges the following affirmative and additional reasons why the Circuit Court of Appeals was right in refusing to consider the purported evidence in the transcript of the record before it and in affirming the decree and in denying petitioner's motion, (made in its petition for rehearing, (Rec., 77) on December 31, 1926, after the order of affirmance had been entered), for an order "directing the lower court to now entertain procedure in accordance with Equity Rule 75b to bring about a statement of the evidence in simple and condensed form" and for "a writ of certiorari to the lower court to bring up to this court such simple and condensed statement as a part of the record on appeal."

Point I.

The Circuit Court of Appeals properly refused to consider the purported evidence because it had not been condensed and put in narrative form, in violation of Equity Rule 75.

We do not deem it necessary to say more in support of this contention than was said in the opinion of the Circuit Court of Appeals itself and than we have already said in answer to the points of petitioner.

Point II.

The purported evidence in the transcript of the record was never, prior to the filing of the transcript in the Court of Appeals on July 3, 1925, presented to or approved by the District Court or Judge, nor was the same filed, upon and after such approval, in the office of the clerk of the District Court, and thereby made a part of the record of the District Court, as specifically required by Equity Rule 75.

In consequence, the clerk of the District Court had no right or authority to include this purported evidence (whether in uncondensed or narrative form) in the transcript of the record filed in the Circuit Court of Appeals, and the Court of Appeals would have had no right to consider the same.

Under Point IV, *post*, page 78, we present our argument in support of our contention that "*filing*" in the District Court clerk's office is an indispensable prerequisite after "*approval.*"

Point III.

The order of March 30, 1926, entered by the District Court at the request of appellant (petitioner here), approving the purported evidence in the transcript of the record, was ineffective because, as a matter of law, such approval could not be evidenced by an independent order such as that of March 30, 1926, but required the certificate and signature of the District Court or Judge to be attached or affixed to the purported evidence in the transcript itself for the purposes of proper identification and authentication, which, however, the District Court or Judge did not do.

The approval of a certificate of evidence, endorsed and identified by the certificate and signature of the trial judge attached thereto, is indispensable to its being filed and made a part of the record in the cause, and in the absence of this an alleged certificate of evidence cannot be included in and made a part of the transcript of such record by the clerk of the court and cannot be considered by the Court of Appeals.

This is, we submit, elementary as a general principle of law.

It is, moreover, we contend, required by Equity Rule 75.

Equity Rule 75 does not say in words, as does the statute governing bills of exceptions, that the certificate of evidence must be signed by the judge. It says that when settled it shall be "*approved* by the judge" and "when *approved* it shall be filed in the clerk's office and become a part of the record for the purposes of the appeal." It is clear, of course, that this means that it cannot be made a part of the record until "*approved*."

The word "*approved,*" however, of necessity involves evidence of approval, and this evidence must, we submit, consist of the signature of the judge attached or appended to the evidence approved, otherwise it does not constitute certification or authentication.

The Circuit Court of Appeals in *Re Jewell Electrical Instrument Co.*, 283 Fed. (C. C. A., 7th Cir.) 978, 980, expressly said that under Equity Rule 75 it is "appellant's duty to procure the trial judge's *certification* of the evidence (*like a bill of exceptions on the law side*)," and as it was held in *Wong Keow* v. *U. S.*, 215 Fed. (C. C. A., 7th Cir.) 95, a certificate of evidence under Equity Rule 75 as well as a bill of exceptions, "*has to be authenticated by the trial Judge.*" Without certification and signature there is no evidence of approval within the meaning of this rule, justifying its being made a part of the record by filing.

The rule as to bills of exceptions is clearly and conclusively established, namely, that the signature of the judge is essential.

It was so held in *Origet* v. *U. S.*, 125 U. S. 240; 8 Sup. Ct. Rep. 846, and in *Malony* v. *Adsit*, 175 U. S. 281; 20 Sup. Ct. Rep. 115.

In *Insurance Company* v. *Lanier*, 95 U. S. 171, it was held (Sylb.):

> "A bill of exceptions, *allowed* and *signed* or *sealed by the judge*, is the only mode by which his rulings during the progress of the trial, or his charge to the jury, *can be rendered a part of the record.*"

And continuing this court said:

> "*But, even if the facts occurred as certificated by the clerk, his statement that they occurred does not bring them upon the record so as to make them the subject of review.* There is but one mode of bringing upon the record and making a part of it the rul-

> ings of a judge during the progress of a trial, or his charge to the jury, and that is by a bill of exceptions *allowed and sealed or signed by the judge.*"

In *Buessel* v. *U. S.* 258 Fed. (C. C. A. 2nd Cir.) 811, 822, 823, after an exhaustive review of this whole question, the court held (Syllabus):

> "Under Equity Rule 75b until the statement of the evidence in an equity case has been approved by the trial court or judge, it is not a part of the record for purposes of appeal."

And the court continuing pointed out that this was true even before the adoption of Equity Rule 75, saying:

> "Prior to Rule 75 testimony in an equity case *had to be made in some way a part of the record.* It did not become a part of the record *simply because it had been given or received* in the court below, *even though it found its way into the transcript.*"

In *Carson* v. *Hurt*, 250 Fed. 30, 33, the court said:

> "The record contains a statement of evidence adduced by the opposing parties, which their respective counsel certified was 'Examined and found correct.' This statement was not approved by the Court or Judge, pursuant to Equity Rule 75. Nothing in it shows that it contained all, or the substance of all, the evidence adduced. The contrary not appearing, it is to be presumed that the Court's findings were supported by evidence other than that which the record on appeal discloses."

The Court of Appeals of the Seventh Circuit held in *Wong Keow* v. *U. S. supra*, that this is equally applicable to *a certificate of evidence in equity*, since, as the court there said:

> "Form is not of the essence, *since each has to be authenticated by the trial judge.*"

Point IV.

Entirely aside from the question whether such approval could be properly evidenced by the independent order of March 30, 1926, or required the certificate and signature of the judge to be attached or affixed to such evidence in the transcript, as we contend, the purported evidence in the transcript never was made a part of the record of said District Court by filing the same in the office of the clerk of the District Court after the entry of the order of March 30, 1926, as required by Equity Rule 75, even if the order of March 30, 1926, be treated as an approval, which we contend it cannot, within the meaning of Equity Rule 75.

Because of the foregoing considerations therefore, the purported evidence never was properly or effectively made a part of the transcript of the record filed in the Circuit Court of Appeals, and hence, was of necessity properly disregarded by that court.

WHEN APPROVED BY THE DISTRICT COURT OR JUDGE, THE STATEMENT OF THE EVIDENCE MUST BE FILED IN THE OFFICE OF THE CLERK OF THE DISTRICT COURT IN ORDER TO MAKE THE SAME A PART OF THE RECORD OF THE CAUSE IN THAT COURT FOR THE PURPOSES OF THE APPEAL, AND IN THE ABSENCE OF SUCH FILING IT DOES NOT BECOME A PART OF THE RECORD FOR THE PURPOSES OF THE APPEAL AND CANNOT BE INCLUDED BY THE CLERK OF THE DISTRICT COURT IN THE TRANSCRIPT OF THE RECORD NOR CONSIDERED BY THE CIRCUIT COURT OF APPEALS ON APPEAL.

This, we submit, is made clear beyond controversy by the language of Equity Rule 75 itself. Its language is:

"When approved, it shall be filed in the clerk's

> office and become a part of the record for the purposes of the appeal."

From this language, and from the general scope and purpose of the rule, we submit this is tantamount to saying that *it shall not* become a part of the record of the District Court for the purposes of the appeal, so that it may be certified to the Circuit Court of Appeals by the clerk of the District Court, unless and until it shall have been filed in the office of the clerk of the District Court, when and after it shall have been approved by the District Court or Judge.

Furthermore, it is a general principle that no document can be made a part of the record in a cause except by filing in the office of the clerk of the court.

The rule is thus stated in 21 C. J. 553:

> "The fundamental idea of the chancery practice was that all proceedings, *including the evidence*, must be made a matter of record, and therefore, all evidence, documentary or otherwise, *must be filed*, except documents already of record or made a part of the pleadings of the party in whose behalf they operate, and admitted in the pleadings of the opposite party."

The filing of the evidence, after approval by the court, in the office of the clerk of the District Court, is indispensable also in order to make certain and absolute the identification of the evidence that has been approved. In the absence of this, such identification becomes a matter of extraneous proof and collateral inquiry which would be intolerable to any court of review.

The alleged certificate of evidence, or purported evidence in the transcript of the record, therefore, was never properly or effectively included in such transcript and could not be considered by the Court of Appeals.

Furthermore, the order of March 30, 1926, purporting to "approve" the purported evidence and directing it to

In *Larson* v. *Seattle*, 121 Wash. 75; 208 Pac. 54, the certificate of the trial judge stated that the transcript contained all the evidence *which appellant asked him to certify*, and not that it contained all the evidence. The transcript was stricken on motion.

In *Rupert* v. *United States*, 181 Fed. (C. C. A., 8th Cir.), 87-89, it was said:

> "The clerk is without authority to certify up anything except that made of record by the orders of the court."

To the same effect is *United States* v. 337 *Cases of Wine*, 1 Woods (U. S., 5th Cir.) 47.

Point VI.

The Circuit Court of Appeals did not err in refusing to grant petitioner's belated motion of December 31, 1926, (Rec. 77) for leave to procure from the District Court a record complying with Equity Rule 75, because such an order would have been a nullity, since it would have directed the District Judge to do an act which, as a court or judge, he was powerless to perform.

The term having passed, and the appeal having been perfected, the cause was pending solely in the Circuit Court of Appeals, and the District Court had lost all jurisdiction. Any act of the District Court, or any order purporting to be made in this cause, changing, adding to or amending the record herein, would have been *coram non judice*.

The Circuit Court of Appeals therefore properly refused to direct the District Court or Judge to perform a judicial act in a cause not pending in that court (except where a mandate staying the cause is granted and it is thereupon redocketed.)

Respondent contends that the Circuit Court of Appeals of right and of necessity denied appellant's motion, made December 31, 1926, after the order of affirmance, in connection with its petition for rehearing (Rec., 77) for "an order directing the lower court to now entertain procedure in accordance with Equity Rule 75 (b) to bring about the statement of the evidence in simple and condensed form," and for "a writ of certiorari to the lower court to bring up to this Court such simple and condensed statement as a part of the record on appeal," because, first, the term at which the final decree was entered had expired for much over a year; and, second, the appeal to the Circuit Court of Appeals had been fully perfected for more than a year.

On both grounds, the District Court had completely lost jurisdiction of "the *cause*, the *parties* and the *record*," (*Jennings* v. *Phila. B. & W. R. Co.*, 218 U. S. 255) and was without *power* "to add to or amend or alter the record in any way." (*Bronson* v. *Schulten*, 104 U. S. 410, and many other cases there cited to sustain both propositions.)

A.

A certificate of evidence, the same as a bill of exceptions, must be settled, "approved" and signed and filed within the term or within such extension as the court may grant, and the court has no power or jurisdiction to do so thereafter.

In *Jennings* v. *Phila. B. & W. Ry. Co.*, 218 U. S. 255; 31 Sup. Ct. Rep. 1, a bill of exceptions was signed and filed after the expiration of the term, no order extending the time having been entered. It was held that the trial court had no power to sign the bill of excep-

tions and it was therefore disregarded and the judgment of the court below affirmed, the court saying:

> "The judge and the court had lost all power over the *cause*, the *parties* and the *record*."

We call the court's particular attention to this case, which, we believe, conclusively supports our contentions.

So in *Mich. Ins. Bank* v. *Eldred*, 143 U. S. 293, the same was held, the court saying (p. 298):

> "*By the uniform course of decisions*, no exceptions to rulings at a trial can be considered by this court unless they were taken at the trial, and were also embodied in a formal bill of exceptions presented to the judge *at the same term, or within a further time allowed by order entered at that term*, or by standing rule of court, or by consent of parties; and, save under very extraordinary circumstances, they must be allowed by the judge and filed with the clerk during the same term. *After the term has expired*, without the court's control over the case being reserved by standing rule or special order, and *especially after a writ of error has been entered in this court*, all authority of the court below *to allow a bill of exceptions then first presented, or to alter or amend a bill of exceptions already allowed and filed, is at an end. United States* v. *Breitling*, 20 How. 252; *Muller* v. *Ehlers*, 91 U. S. 249; *Jones* v. *Grover & Baker Co.*, 131 U. S. Appx. 150; *Hunnicutt* v. *Peyton*, 102 U. S. 333; *Davis* v. *Patrick*, 122 U. S. 138; *In re Chateaugay Co., Petitioner*, 128 U. S. 544."

In *Bronson* v. *Schulten*, 104 U. S. 410, this court clearly shows that the rule stated in the foregoing cases is of general application and extends as much to the equity side as it does to the law side of the court.

The court among other things said (p. 415):

> "*In this country all courts have terms and vacations.* The time of the commencement of every term, if there be half a dozen a year, is fixed by statute, and the end of it by the final adjournment of the court for that term. *This is the case with re-*

gard to all the courts of the United States, and if there be exceptions in the State courts, they are unimportant. *It is a general rule of the law* that all the judgments, *decrees* or other orders of the courts, however conclusive in their character, are under the control of the court which pronounces them during the term at which they are rendered or entered of record and they may then be set aside, vacated, modified, or annulled by that court.

But it is a rule equally well established, that after the term has ended all final judgments and *decrees* of the court pass beyond its control, unless steps be taken during that term, by motion or otherwise, to set aside, modify, or correct them; and if errors exist, they can only be corrected by such proceeding by a writ or error or appeal as may be allowed in a court which, by law, can review the decision."

And continuing, the court said (p. 417):

"The question relates to the *power* of the courts and *not to the mode of procedure*. It is whether there exists in the court the authority to set aside, vacate, and modify its final judgments after the term at which they were rendered. • • •

We are also of opinion that the general current of authority in the courts of this country fixes the line beyond which they cannot go in setting aside their final judgments *and decrees*, on motion made after the term at which they were rendered, far within the case made out here. *If it is an equitable power supposed to be here exercised, we have shown that a court of equity*, on the most formal proceeding, taken in due time, *could not, according to its established principles, have granted the relief which was given in this case.*"

From the earliest times this court has held that a court of equity has no power after the term to set aside, modify or correct its decrees.

Cameron v. *M'Roberts*, 3 Wheat 591.

Sibbald v. *U. S.*, 12 Pet. 488.

There would seem to be no room for doubt that this

rule of necessity extends equally to the approval and certification of a certificate of evidence in equity.

It will be observed that there is nothing in the statute, governing bills of exceptions, providing when the bill of exceptons must be signed and filed, whether within the term or otherwise. Yet, as was held in *Bronson* v. *Schulten, supra*, "*it is a general rule of the law*" that upon the expiration of the term the trial court has, as was said in *Jennings* v. *Phila. B. & W. Ry. Co., supra*, "lost control of the cause and had no authority *to add to or take from this record.*"

The mere fact that Equity Rule 75 does not fix the time within which a certificate of evidence must be approved and certified by the court and filed in order to make it a part of the record in the cause, cannot abrogate this "*general rule of law*" applicable to equity as well as to common law causes, since, as we have said, the statute governing the signing and filing of bills of exceptions is equally deficient in this respect. As the Supreme Court of the United States has said (*Bronson* v. *Schulten, supra*) "it is a general rule of the law" and "relates to the *power* of the courts and *not to the mode of procedure.*"

In 15 Ruling Case Law, 677, Sec. 128, it was said that the reason for the rule is that "during the whole term in which any judicial act is done, *the record* remains in the breast of the judges of the court, and therefore *the roll* is alterable during the term as they shall direct. *But when the term is past the roll is the record, and admits of no alteration.*"

And continuing, it is said:

> "*Not even a court of equity* is considered as having the power to vacate or annul its own judgment or decree beyond the term at which it was pronounced."

See, also, to the same effect:

21 C. J. 706, 707 and note 76.

10 A. L. R. 561 and 562.

The general rule is recognized and stated by the Supreme Court of Illinois in *Miller* v. *Anderson*, 269 Ill. 608, 613:

> "The practice as to settling and signing certificates of evidence *in chancery* cases *has always been the same in this State as in settling and signing bills of exceptions.*"

In *Conductors' Benefit Association* v. *Leonard*, 166 Ill. 154, it was said (p. 157):

> "It is undoubtedly true, as contended by appellee that *a certificate of evidence*, when duly signed and filed, is a part of the decree (*Bennett* v. *Bradford*, 132 Ill. 269), and *that a motion for leave to file a certificate of evidence is a motion for leave to amend the decree* (*Ibid*)."

B.

When an appeal has been fully perfected, nothing remaining to be done to that end, the exclusive jurisdiction of the cause is vested in the Court of Appeals pending the appeal, and the trial court loses all jurisdiction over the cause and its record and the parties, and cannot be reinvested with jurisdiction or authority to add to or take from the record by approving and certifying to a certificate of evidence, any more than a bill of exceptions or otherwise, either on its own motion or by the Court of Appeals.

In *Jennings* v. *Phila. B. & W. Ry. Co.*, 218 U. S. 255; 31 Sup. Ct. Rep. 1, a bill of exceptions was signed by the trial judge after the term and after an appeal bond was approved and filed. The court, in holding that for

both reasons the court was without jurisdiction and power so to do, among other things said:

> "No order had been made in term time for the filing of such a delayed bill. *Not only had the term closed, but an appeal had been allowed and perfected.* The trial court had thereby lost control of the cause, and *had no authority to add to or take from the record.*"

And continuing the court said:

> "The proceeding was *coram non judice*. Appellee was not in court or *before a court*. The judge and the court had lost all power over *the cause, the parties* and *the record.*"

Under Equity Rule 75, appellee's counsel have a right to be heard on the settling of the certificate of evidence. Manifestly, the rule does not contemplate an arbitrary power in the District Court, or in the Court of Appeals, to direct the District Court to settle the certificate of evidence, and thereupon approve and certify and sign the same, without giving counsel for appellee an opportunity to make the showing provided for in the rule itself. If, however, as the Supreme Court has said, the close of the term, and especially the perfecting of the appeal, has resulted in the District Court losing all power over *the parties* as well as the *cause* and the *record*, we ask how can appellee now be required to participate in a *judicial hearing* in the District Court for the purpose of *judicially* settling the certificate of evidence?

That the *settling* and "*approval*" of a certificate of evidence involves a *judicial hearing* and act, is self-evident and is shown by the cases cited by us under Division C, *post*.

In *Mech. Ins. Bank* v. *Eldred*, 143 U. S. 293, a bill of exceptions was signed by the judge and filed during the term at which judgment was entered. After the ex-

piration of the term, and after a writ of error was sued out and entered in the Supreme Court, the judge on the application of plaintiff's attorneys ordered the original bill of exceptions *to be amended by adding two exceptions* to rulings made by him on the trial, and signed the same *nunc pro tunc* as of the date of the signing of the original bill of exceptions, and ordered it to be filed *nunc pro tunc* as of the date of its filing.

The court held, as we have before shown, not merely that the power of the court terminated with the expiration of the term, but this was especially true after a writ of error had been entered in the Supreme Court.

In *Blisse* v. *U. S.* 263 Fed. (C. C. A. 2nd Cir.) 961, 965, the court expressly held that after an appeal or writ of error has been perfected the lower court is without authority to sign a bill of exceptions, or, "to proceed further until the writ of error has been heard and determined and the case remanded to it," saying that, "when a writ of error is perfected the cause comes within the authority of the Appellate Court alone," citing in support *Mich. Ins. Bank* v. *Eldred, supra; Jennings* v. *Phila. B. & W. Ry. Co., supra; Hovey* v. *McDonald*, 109 U. S. 150, 157; 3 Sup. Ct. 136, and other cases.

And the court further said (p. 967):

> "*The signing of a bill of exceptions after the expiration of the term is a grave matter*, and it is a peculiarly grave matter when it is signed 15 *months after the expiration of the term.* If it is to be justified by the consent of the United State's attorney, we do not think that his consent should rest upon his silence and upon inferences. We are also of the opinion that his consent, even if expressly given, *would be ineffective, if the writ of error had already removed the case into this court.*"

In *First National Bank* v. *State National Bank*, 131 Fed. (C. C. A. 9th Cir.) 430, the court said (p. 431):

> "*The overwhelming weight of authority of the*

state courts is that an appeal, properly perfected, absolutely removes the case from the trial court, and places it in the appellate tribunal. The case must, of necessity, either be in the Appellate or lower court. *It cannot very well be in both courts at the same time.* Such a course would lead to endless confusion. *Under all the ordinary rules of practice,* the Appellate Court alone would have the jurisdiction. After the cause leaves the lower court, it is deprived of taking any action *upon any question involved in the appeal.* Many of the authorities in the state courts upon this point are collected and cited in Elliott's App. Procedure 541. *The Federal authorities are substantially to the same effect.*"

This language was used in connection with an appeal in a bankruptcy proceeding, in which the rules governing causes in equity apply.

So in *Re Gustin*, 281 Fed. (D. C. Mich. 1922), 320, it was held that after an appeal had been taken in a bankruptcy proceeding (which is in its nature an equity proceeding), the lower court had no power to strike from the records certain of the pleadings, the court saying:

> "As the effect of this was to *transfer the jurisdiction* of this court over this cause and its power to proceed further therein to the appellate court, this motion cannot be considered by me, at least unless and until the proceedings have been remanded for that purpose."

In *Keyser* v. *Farr*, 105 U. S. 265, 266, which was an equity proceeding, it was said:

> "After the acceptance of the bonds for the appeal and *the docketing* of the cause in this court, the jurisdiction of the court below was gone. *From that time the suit was cognizable only in this court.*"

To the same effect is *Draper* v. *Davis*, 102 U. S. 370, which was also an equity case.

So in *Kendrick* v. *Roberts*, 214 Fed. (D. C. Ga.) 268, it was held that the District Court, after approving a supersedeas bond, made a part of the record in the case,

which had been filed in the Circuit Court of Appeals on writ of error, has no jurisdiction to vacate the supersedeas, the court saying:

> "The jurisdiction of the Appellate Court over the case *now is complete;* it having been transferred to that court, and therefore *entirely* removed from the jurisdiction of this court."

In *Omaha Electric L. & P. Co.* v. *City of Omaha*, 216 Fed. (C. C. A. 8th Cir.) 848, 855, which was a chancery proceeding, it was said:

> "It is a universal rule that the perfecting of an appeal *transfers the cause* to the Appellate Court, and that it remains there until it is remitted to the trial court by the sending down of the mandate."

Citing many cases.

In *Morrin* v. *Lauler*, 91 Fed. (C. C. N. Y.) 693, it was held that it is the rule in the federal courts that when all the steps necessary to perfect an appeal have been taken, the action is within the control of the Appellate Court, and a motion for substitution of the appeal bond must be addressed to that court, saying:

> "The trial court should not engage in undoing or modifying the proceedings by which such jurisdiction has been obtained."

See, also:

> Fed. App. Jurisdiction and Procedure (Zoline) par. 646.
>
> *Harding* v. *Oregon-Idaho Co.*, 110 Pac. 412, 414, 57 Ore. 34.

In the case at bar every step necessary to the perfecting of the appeal was taken, long before the motion under consideration was made as we have shown.

C.

The settling and signing of a bill of exceptions or a certificate of evidence is not a ministerial, but is on the contrary a judicial act, and cannot be exercised unless the judge has jurisdiction of the cause and the parties and control over its record, which was not true in the case at bar, as we have shown.

In 4 Corpus Juris, 247, it is said:

> "The settling and allowance, that is, *determining* the *correctness* of the bill, *is a judicial act*, and therefore cannot be performed by the Judge in his individual capacity."

On page 251, it is said:

> "Since the determination of what shall be incorporated in a bill of exceptions is in the nature *of a judicial act* to be performed by the exercise *of judicial power*, it cannot be delegated to another."

As was said by the Supreme Court in *Bronson* v. *Schulten, supra:*

> "The question relates to the *power* of the courts and *not to the mode of procedure.*"

In *Oxford & Coast Line R. Co.* v. *Union Bank*, 153 Fed. (C. C. A. 4th Cir.) 723, the court in holding that a bill of exceptions cannot be considered by the Appellate Court unless allowed and signed during the term, or within the time extended by an order made during the term, among other things said (p. 726):

> "The signing of a bill of exceptions is *a judicial act* which much be performed by the judge who tried the case, and the performance of this duty cannot be delegated to another, nor can the judge after the time within which the bill of exceptions is required to be signed, *cure an omission or failure to sign the same by certifying that it was allowed, settled and signed within the time allowed by law.*"

And again (p. 727):

> "The Court below is the sole judge *as to what transpired* during the progress of the trial, and it must *judicially determine* the same when the bill of exceptions is presented, and after having done so, it then becomes the duty of the judge to affix his signature thereto."

All these observations are equally true of a certificate of evidence.

That this is a judicial and not a ministerial act is shown also by the following cases:

Malony v. *Adsit*, 20 Sup. Ct. Rep. 115; 175 U. S. 281.

Mallers v. *Whittier Machine Co.*, 170 Ill. 434.

Young v. *City*, 173 Ill. App. 311.

Citizen's St. R. Co. v. *Heath*, 154 Ind. 363; 55 N. E. 744.

Winter v. *People*, 51 Pac. 1006; 10 Colo. App. 510 (aff. 27 Colo. 136, 60 Pac. 344).

Va. Devel. Co. v. *Rich Patch Iron Co.*, 37 S. E. 280; 98 Va. 700.

Cincinnati Traction Co. v. *Ruthman*, 96 N. E. 1019; 85 Ohio St. 62.

Morgan v. *Perkins*, 113 N. W. 583; 150 Mich. 64.

Herren v. *Merrilees*, 54 Pac. 467; 7 Okla. 261.

Darden v. *Williams*, 45 S. W. 669; 100 Tenn. 414.

In *Hake* v. *Strubel*, 121 Ill. 321, 327, it was said:

> "The settling and allowance, signing and sealing, a bill of exceptions, under the law, considered as a single act, is, *in its nature, both judicial and ministerial. It is judicial in this*, that the trial judge *must adjudge* whether the bill presented is, under the law a proper bill for him to sign, and *he alone must decide* whether, in its recitals and contents, it conforms to the fact; *while the mere act of signing and sealing* a bill, *after the judicial act* of settling and allowing it has been performed by the judge, *is purely ministerial.*"

This language is peculiarly applicable to the provisions of Equity Rule 75, providing the manner in which the evidence taken *in equity causes* shall be settled and approved, *involving a judicial hearing*, participated in by *both parties*, and consideration and action by the court.

The order requested by petitioner could not properly have been entered, because the evidence under Equity Rule 75 must be settled, approved, certified and filed in the manner provided by this rule, which involves giving appellee an opportunity to be heard, and judicial consideration and determination by the District Court.

If the *settling* and *approval* of a certificate of evidence involves *a judicial hearing* and *act*, how can it be performed if the District Court has, as the Supreme Court said in *Jennings* v. *Phila. B. & W. Ry. Co.*, *supra*, lost jurisdiction of the *parties*, as well as of *the cause* and its *record*?

D.

The following cases, holding that the settling and approval and filing of a certificate or statement of the evidence, under Equity Rule 75, is a ministerial act and may be done after the term and the perfecting of an appeal, we contend, are unsound and should not be followed.

In re General Equity Rule 75, 222 Fed. 884.
Struett v. *Hill*, 269 Fed. 247.
Sussex Land Co. v. *Midwest Refining Co.*, 294 Fed. 597, and
Goodwin v. *United States*, 295 Fed. 856.

We respectfully submit that the holdings in these cases are not only not supported by, but are contrary to, the plain letter of Equity Rule 75 and the holdings of

the Supreme Court and the principles of law this court has announced, as well as the general rules of law universally recognized and applied.

In 222 Fed. 884, no decision of the Supreme Court is cited in support.

It is said that Equity Rule 75 fixes no time within which the statement of evidence must be settled and filed. The same is true of a bill of exceptions, and yet "the general rule of law" (*Jennings* v. *Phila. B. & W. Ry. Co.*, 218 U. S. 255; *Bronson* v. *Schulten*, 104 U. S. 410) is that the lower court has no "*power*" to settle and sign a bill of exceptions after the expiration of the term, or an extension of time entered within the term; and especially, as was said in the cases referred to by us, *supra*, after a writ of error or appeal has been perfected.

It is not said that these rules of law are not of general application, extending to equity as well as common law cases, and no cases are cited to sustain any such claim.

It is said that undoubtedly the better practice is to settle and sign the certificate of evidence under Equity Rule 75 before the appeal is perfected, or the term expires. If this be the better rule, we ask where is the authority for the worse or the contrary rule laid down by the court. As the court said in *Bronson* v. *Schulten*, *supra*, this is a question of power, not mode of procedure or practice.

It is said that where appeals are required within thirty days or ten days the time may be wholly insufficient. The answer is that this can be rectified either by an extension of time into the next term, or by a modification of the rule that fixes too short a time. It is, we submit, no justification for the abrogation of the rule. Short periods are prescribed in state statutes for appeals and

writs of error, and yet the general rule in the state courts is to require the bill of exceptions or certificate of evidence, as the case may be, to be filed within the term, or a proper extension, or in any event before the writ of error or appeal is perfected.

And the court says that the expiration of the term may very commonly be forgotten. The same is true of bills of exceptions, and yet the rule is strictly applied. We do not understand that forgetfulness on the part of counsel can abrogate the rules of courts.

The court says that it is not satisfied that the analogy between bills of exceptions and certificates of evidence is close enough to justify the incorporation of the harsh rule governing bills of exceptions into the practice pursuant to Rule 75.

We submit they are absolutely analogous, since both are intended to make a matter of record the proceedings of the court below, and to preserve them for the purposes of review in the Court of Appeals, as was expressly held by the Circuit Court of Appeals for the Seventh Circuit, in *Jewell Electrical Instrument Company*, 283 Fed. 978, and *Wong Keow* v. *U. S.*, 215 Fed. 95, and as the many cases we have cited clearly show.

Nor have we ever heard this rule characterized as a harsh rule, and can hardly bring ourselves to believe that the rule would have remained in existence and would have been consistently enforced by the federal as well as state courts if it were a harsh rule and worked injustice.

It is in the light of these considerations that the court concludes that the trial court had power to approve and direct the filing of the statement of evidence after the expiration of the term. We respectfully submit that the court has given no sound reason or justification for its

conclusion in the light of the decisions of the Supreme Court and of the other federal courts, we have cited.

The court says that the same general view leads it to the conclusion that the perfecting of the appeal by the approval of an appeal bond and the signing of a citation does not deprive the trial court of jurisdiction to settle the evidence. While recognizing the general rule with reference to the ousting of jurisdiction by the perfecting of an appeal, it says that "upon the whole the proceeding is rather ministerial." We have abundantly shown, we submit, that the action is not ministerial, but is essentially judicial, the *Jennings case*, 218 U. S. 255, characterizing it as *a grave matter*.

Furthermore, it seems that the general views laid down by the court were not intended to be final, nor to establish a general future practice, but were only to apply "during the transition in the general practice," the observations of the court having been laid down in 1914, and only a short time, about a year or so, after the new Equity Rule 75 was adopted, the court further saying that the sending of a record back for correction or the dismissal of the appeal, or the striking of the evidence from the record, "may prove to be necessary in some cases, but we are reluctant to apply it now."

It will be noted that it is now fifteen years since Equity Rule 75 was adopted, and that the transition period has long since passed.

In *Struett* v. *Hill*, 269 Fed. 247, the court seems to have been influenced largely by the views expressed in 222 Fed. 884, saying that it is "in agreement with the view of the court" in that case.

The general observations we have made concerning the latter case apply equally to the former.

Let it be noted also that in 222 Fed. 884 and 269 Fed. 247, the courts confine themselves to situations in which the appeal has been perfected only to the extent of the filing of an appeal bond, assignment of errors and signing of citation. They do not speak of a situation such as in the case at bar, where in addition to all of the foregoing the cause had been *docketed* in the Circuit Court of Appeals and *a transcript of the record*, the *printed record* and the *briefs had been filed*, and appellee had been compelled to and had entered its appearance, so that full jurisdiction over the appellee existed. Nor do they refer to a situation in which not only had a transcript of the record been filed, but the time in which to file the same, under the rule of the Court of Appeals had also long since expired.

In *Sussex Land & Live Stock Co.* v. *Midwest Refining Co.*, 294 Fed. 597, 600, the claim was made that no statement of evidence was approved and filed within the term, or some extension entered during the term. The court simply said "this contention is not well founded," citing in support the two above mentioned cases. If the court gave this matter any real consideration, it is not reflected in its opinion.

In *Goodwin* v. *United States*, 295 Fed. 856, the court also dismisses the same contention with respect to the necessity of approving and filing a certificate of evidence under Equity Rule 75 within the term, or an extension, by saying that "the limitation to the trial term does not extend to the settling of such a statement of evidence" under Equity Rule 75, citing in support only 222 Fed. 884.

We submit that under the circumstances shown in this case and the extraordinary condition of the record the

order of the Circuit Court of Appeals was clearly right and should be affirmed.

Respectfully submitted,

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APPENDIX A.

I. Appeals affirmed or evidence stricken because testimony not in narrative form.

Opperman v. *Petri*, 107 S. W. (Tex.) 1142.

Stricken, because not in narrative form, though the judge made up the statement in question and answer form, the court holding that the policy of the court rule and statute was best served by requiring the judge, as well as the attorneys, to put the statement in narrative form.

Brown v. *Vizcaya*, 54 S. W. (Tex.) 636.

Evidence stricken because not in narrative form, the court saying it cannot fail to strike "without disregarding its duty."

Griffin v. *Burrus*, 292 S. W. (Tex.) 561.

Judgment affirmed where statement of facts not in narrative form, and case depended on the facts.

Dolson's v. *Sheridan Stove Mfg. Co.* 178 S. W. (Tex.) 663.

Albrecht v. *Lignoski*, 151 S. W. (Tex.) 886 and 154 S. W. 354.

Albers v. *Roberts*, 150 S. W. (Tex.) 596.

Cookville Coal & Lumber Co. v. *Evans*, 135 S. W. (Tex.) 750.

Evidence stricken because not in narrative form.

Wentworth v. *King*, 49 S. W. (Tex.) 696.

Statement stricken because not in narrative form, though agreed upon.

Peoples v. *Evans*, 111 S. W. 756; 50 Tex. Civ. App. 225.

Evidence stricken because not in narrative form, and the court refused to consider motive for putting evidence in form presented.

McWilliams v. *Ft. Stockton Irrigated Lands Co.*, 156 S. W. (Tex.) 556.

Evidence stricken and judgment affirmed for failure to put evidence in narrative form.

O'Keefe v. *Beecher*, 117 N. W. 353; 17 N. Dak. 404.

Smith v. *Kunert*, 115 N. W. 76; 17 N. Dak. 120.

Cleveland C. C. & St. L. Ry. Co. v. *Snow*, 74 N. E. 908; 37 Ind. App. 646.

Indiana D. & W. Ry. Co. v. *Ditto*, 64 N. E. 222; 158 Ind. 669.

Barger v. *Halford*, 24 Pac. 699; 10 Mont. 57.

Court refused to consider evidence brought up in question and answer and not in narrative form, contrary to rule.

II. Appeals dismissed or judgment affirmed for failure to comply with miscellaneous rules of court.

Wade v. *Leach*, 2 Fed. (2nd) (C. C. A. 5th Cir.) 367.

Appeal dismissed for failure to file proof of service showing portions of record to be incorporated under Equity Rule 75.

Babcock v. *Johnson*, 53 N. E. 241; 22 Ind. App. 97.

Appeal dismissed for failure to comply with court rule requiring index and marginal notes to abstract.

Davis v. *Wall*, 55 S. E. 350; 142 N. Car. 450.

Appeal dismissed because exceptions not numbered, nor briefly and clearly stated, nor index put in front of record, as required by rule, the court saying this was an alternative remedy, but was applied to discourage further infraction.

Greenwood v. *Randall*, 111 U. S. 775.

Judgment affirmed because the record failed to state in proper form the questions argued.

Harty v. *Victoria*, 33 Sup. Ct. 4 (226 U. S. 12).

Carter County v. *Schmalstig*, 127 Fed. (C. C. A. 6th Cir.) 126.

Wong Sang v. *U. S.* 144 Fed. (C. C. A. 1st Cir.) 968.

Dismissed for failure to enter appeal before return day of citation in accordance with rule of court.

Selma and M. R. Co. v. *Louisiana Nat'l Bank*, 94 U. S. 253.

Appeal dismissed because docket fee not paid in time.

Green v. *Elbert*, 137 U. S. 615.

Same held, though plaintiff, member of bar, pleaded ignorance of rules, but held no excuse.

Corinne M. C. & S. Co. v. *Johnston*, 13 Pac. 17; 5 Utah 147.

Appeal dismissed for failure to file transcript in time under rule of court.

Chadwick v. *People*, 206 Ill. 122.

Appeal dismissed of court's own motion for failure to make index to abstract required by court rule.

Mason v. *Linn*, 67 Atl. 61; 218 Pa. 161.

Appeal dismissed, because no brief statement of errors relied on filed with notice of appeal, in accordance with court rule.

Whinrey v. *Starr*, 74 N. E. 32; 35 Ind. App. 623.

State v. *Lankford*, 62 N. E. 624; 158 Ind. 34.

Dixon v. *Poe*, 62 N. E. 628; 158 Ind. 54.

Baubletts v. *Krug Park Amusement Co.* 81 S. W. (Mo. App.) 1179.

Dismissed for failure to file copies of brief as required by rules.

Chinn v. *Davis*, 18 Mo. App. 539.

Appeal dismissed for failure to comply with rule requiring service of abstract and brief on appellant.

Cunningham v. *School District*, 215 S. W. (Mo.) 249.

Affirmed, where abstract of record did not conform to rule of court.

Rumfelt v. *Trinity River C. & H. M. Co.* 24 Pac. 276; 83 Cal. 649.

Appeal dismissed where transcript written and not printed, as required by rules.

Howlett v. *Tuttle*, 15 Pac. 342; 10 Col. 222.

Pearson v. *Household S. M. Co.* 14 S. W. 890; 78 Tex. 385.

Carriger v. *Kennedy*, 33 N. E. 907; 134 Ind. 107.

Appeal dismissed where not filed in time prescribed by rule.

Wetmore v. *Wetmore*, 51 N. Y. St. Rep. 274.

Appeal dismissed for failure to comply with court rule as to serving printed copies of appeal papers.

III. Appeals dismissed or judgment affirmed for miscellaneous reasons.

Burr v. *Henry*, 80 N. W. 900; 59 Neb. 301.

Appeal dismissed for failure to authenticate certain papers, though clerk's certificate attached, but did not expressly cover all papers.

Grant v. *Grant*, 46 Iowa 478.

Davenport v. *Ells*, 22 Iowa 296.

Affirmed where certificate of clerk to transcript merely states it contains all evidence on file, and not all evidence heard and considered.

Grigsby v. *Purcell*, 99 U. S. 505.

Dismissed for failure to docket appeal or file transcript within the term.

Hamilton v. *Moore*, 3 Dall. 371.

Blair v. *Miller*, 4 Dall. 21.

Castro v. *U. S.* 3 Wall. 46.

State v. *Demarest*, 110 U. S. 400.

Norton v. *Brownsville*, 129 U. S. 505.

Dismissed because writ of error or appeal not prosecuted in time.

Mussina v. *Cavazos*, 6 Wall. 355.

Affirmed because bill of exceptions not signed or sealed by trial judge.

Edmonson v. *Bloomshire*, 7 Wall. 306.

Villabolos v. *U. S.* 6 How. 81.

Appeal dismissed, because not taken in time, though neither party objected. Court said rule technical, but prescribed by Congress, and must be followed.

Western Union v. *Todd*, 54 N. E. 446; 22 Ind. App. 701.

Appeal dismissed because transcript not authenticated by clerk.

Ditch v. *Sennott*, 116 Ill. 288.

Appeal dismissed because no assignment of errors inserted in record, although set forth in abstract of record.

Voges v. *Davison*, 306 Ill. 357.

Writ of error dismissed, apparently on court's own motion, because no assignment of error in record, although argued in briefs.

APPENDIX B.

Additional cases showing the attitude of courts toward the belated attempts of appellants to amend records.

So in *Oxford & Coast Line R. Co.* v. *Union Bank*, 153 Fed. (C. C. A. 4th Cir.) 723, 728, it was said:

> "While it is not the policy of the court to dismiss writs of error and cases on appeal on account of slight technicalities, at the same time, the rules of this court, as well as the rules of the Circuit Court, are plain and easily understood. In this instance, the provision of the statute relating to the question at issue is *mandatory* and *must be enforced*. It is incumbent upon attorneys who practice in the federal courts to observe and strictly follow the rules of practice and procedure in preparing and presenting bills of exceptions." (*Michigan Ins. Bank* v. *Eldred*, 143 U. S. 298.)

Continuing, the court said:

> "It is essential to the orderly procedure of the courts that attorneys should comply with the rules relating to the same; otherwise, it would be useless to promulgate rules for the guidance of those who may seek to review the action of the lower court."

And the court quotes with approval from Mr. Justice Story on Equity Pleading (Sec. 544), as follows:

> "The want of due form constitutes a just objection to the proceedings in every court of justice, for to reject all form would be destructive of the law as a science, and would introduce great uncertainty and perplexity in the administration of justice. Every irregularity of this sort is fraught with inconvenience and generally tends to delays and doubts. And it has been well remarked that infinite mischief has been produced by the facility of courts of justice in overlooking errors of form. It encourages carelessness and places ignorance too much on a footing with knowledge amongst those who practice the drawing of pleadings."

In *Barlass* v. *Kargus*, 87 N. W. 800; 111 Wis. 611, application was made after the argument for leave to with-

draw the record and return same to the trial court for the purpose of obtaining a proper certificate, and was denied, the court saying (p. 801):

> "We have found it necessary to adhere closely to the rule that the record must be complete when a case is placed upon the assignment for argument."

In *Allen* v. *LeMoyne*, 101 Ill. 655, the court held that an application to amend the record made after decision, and pending an application for rehearing, comes too late, saying:

> "Such a practice would be exceedingly objectionable, as enabling parties to bring their cases to this Court by piecemeal."

In *Nealan* v. *Ring*, 193 Pac. 747; 98 Ore. 490, which on the facts will be found strikingly similar to the facts in the case at bar, the case was argued October 6, 1920, and the opinion handed down later, the court declining to consider the testimony because it had not been filed with the clerk of the Circuit Court, or authenticated by the Circuit Judge. After the opinion, appellant secured the certification, and moved for a rehearing on the merits. The court held that the application came too late.

In *Tunnicliff* v. *Watts*, 210 S. W. (Mo.) 876, the record was deficient in certain formal aspects. A motion to dismiss the appeal or affirm the judgment was made, and sustained, and the judgment affirmed. Appellant asked leave to amend, but it was held that the motion to amend came too late after a motion to dismiss or affirm.

In *Smith* v. *Gustin*, 81 N. E. 722; 169 Ind. 42, the court said:

> "The rule has been long established that this court will not grant a rehearing to enable a party to correct or perfect a record."